

2008

"They say I am not an American...": The Noncitizen National and the Law of American Empire

Christina Duffy Ponsa-Kraus
Columbia Law School, cponsa@law.columbia.edu

Follow this and additional works at: https://scholarship.law.columbia.edu/faculty_scholarship



Part of the [Constitutional Law Commons](#), [Fourteenth Amendment Commons](#), [Immigration Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Christina D. Ponsa-Kraus, *"They say I am not an American...": The Noncitizen National and the Law of American Empire*, 48 VA. J. INT'L L. 659 (2008).

Available at: https://scholarship.law.columbia.edu/faculty_scholarship/2628

This Article is brought to you for free and open access by the Faculty Publications at Scholarship Archive. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Scholarship Archive. For more information, please contact cls2184@columbia.edu.

“They say I am not an American...”: The Noncitizen National and the Law of American Empire

CHRISTINA DUFFY BURNETT*

TABLE OF CONTENTS

Introduction.....	660
I. Citizens, Subjects, Nationals, Aliens.....	668

* Associate Professor of Law, Columbia University. For their suggestions, feedback, and/or other forms of support during the completion of this Article, I am grateful to David Abraham, George Bermann, D. Graham Burnett, Josep Cañabate-Pérez, Gonzalo Córdova, Astrid Cubano-Iguina, Elizabeth F. Emens, Sam Erman, Robert Ferguson, Carlota Gómez, Luis González-Vales, Caitlin Grusauskas, Hendrik Hartog, Scott Hemphill, David Hollander, Benedict Kingsbury, David Lieberman, Fernando Picó, Alex Raskolnikov, Francisco Scarano, Lorrin Thomas, and John Witt; the participants in “Law and Political Development in America” (Legal History Consortium Conference, Philadelphia, Pa., February 23, 2007), the Colonial Law Seminar (Empires Project, University of Wisconsin, Madison, Wis., March 16, 2007), and “American Colonialism: Citizenship, Membership, and the *Insular Cases*” (University of Virginia, Charlottesville, Va., March 28, 2007); and the staff of the Centro de Estudios Históricos at the University of Puerto Rico, especially Magali Cintrón Burgos. I am also grateful to the editors of the *Virginia Journal of International Law* for their excellent editorial work.

The title quotation, “They say I am not an American...,” comes from a letter written to Federico Degetau y González (who figures prominently in this article) in 1903. Letter from Pascual López to Degetau (Oct. 12, 1903), in *Papers of Federico Degetau y González*, Colección Ángel Mergal Llera (on file with Centro de Estudios Históricos, Universidad de Puerto Rico) [hereinafter Degetau Papers], 4/V/319 (original in Spanish).

Citations to archival documents will be rendered in “Box/File/Document” format. The use of accents in the late nineteenth century differs significantly from current usage; in my citations to documents in the Degetau Papers, I have rendered names and words as they appear in the original documents. (For instance, today the name López takes an accent on the “o,” but Pascual López did not use an accent in his letter to Degetau, so I have not used an accent in the cite, but I have used one in my own references to López.) The Degetau Papers (including Pascual López’s letter) are primarily in Spanish; all translations are my own. This Article forms part of a larger work-in-progress on the constitutional and international legal history of American empire.

II. From Natives to Citizens	682
III. "Puerto Ricans are now Americans..."	706
Conclusion	713

The American papers sometimes contain tales about persons who have forgotten who they are, what are their names, and where they live. The Porto [sic] Ricans find themselves in the same predicament as those absent-minded people. To what nationality do they belong? What is the character of their citizenship? ... [I]f since they ceased to be Spanish citizens they have not been Americans [sic] citizens, what in the name of heaven have they been?¹

INTRODUCTION

Isabel González arrived in New York in August of 1903.² A pregnant woman twenty years of age, she had left her home in Puerto Rico to join her baby's father, who was working at a factory in the city. But upon her arrival, she was detained at Ellis Island, where immigration authorities excluded her from admission on the ground that she was an alien immigrant likely to become a "public charge."³ González sued for ha-

1. D. Collazo, Letter to the Editor, *Nationality of Porto Ricans*, N.Y. TIMES, Sept. 13, 1904, at 8. The U.S. government misspelled Puerto Rico as "Porto Rico" from its annexation until 1932. See JOSÉ A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE: NOTES ON THE LEGISLATIVE HISTORY OF THE UNITED STATES CITIZENSHIP OF PUERTO RICANS 1 n.1 (1978). Collazo no doubt knew the proper spelling of "Puerto Rico": he was the uncle of Isabel González, the Puerto Rican plaintiff in the Supreme Court case *Gonzales v. Williams*, 192 U.S. 1 (1904), which I discuss in this Article. As is evident from the case caption, the Court misspelled González's name, too.

2. The facts in this opening paragraph are based on the opinion in *Gonzales*, 192 U.S. 1, and on the record in the case. See *Gonzales v. United, States*, 192 U.S. 1 (1904) (No. 225), *microformed on U.S. Supreme Court Records and Briefs* (Microform, Inc.) [hereinafter *Gonzales Record*]. González's first name is rendered as "Isabella" in all of these documents; I am indebted to Sam Erman for pointing me to a letter written by Isabel González that confirms the correct spelling of her name. See Sam Erman, *Meanings of Citizenship in the U.S. Empire: Puerto Rico, Isabel Gonzalez, and the Supreme Court, 1898-1905*, 27 J. AM. ETHNIC HIST. (forthcoming 2008). Erman does not use the accent in "González" because González herself did not use the accent when signing a letter to Degetau; I have retained the accent, following current usage. See *supra* note *.

3. The criteria for the admission of noncitizens, worthy of scrutiny in their own right, are beyond the scope of this Article. On these, see generally JOHN HIGHAM, *STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM, 1860-1925* (1955); MATTHEW FRYE JACOBSON, *WHITENESS OF A DIFFERENT COLOR: EUROPEAN IMMIGRANTS AND THE ALCHEMY OF RACE*

beas, arguing that as a native inhabitant of Puerto Rico—which, along with the Philippines and Guam, had been annexed by the United States at the end of the war with Spain in 1898—she could not be an alien immigrant, but must be a citizen of the United States.

But she was fighting an uphill battle: the treaty of peace between the United States and Spain had carefully avoided promising citizenship to the native inhabitants of the new U.S. territories, and the congressional statute establishing a civil government on the island had described them as “citizens of Porto Rico,” not citizens of the United States.⁴ Relying on the treaty and statute, the Circuit Court in the Southern District of New York rejected González’s habeas petition, concluding that a “citizen of Porto Rico” was not a “citizen of the United States”—and prompting one newspaper to quip that González was a “Citizen, But Not A Citizen.”⁵ The U.S. Supreme Court, however, granted review of the case, and in *Gonzales v. Williams* (1904), it agreed with González—to a point.⁶ The Court held that native Puerto Ricans were not alien immigrants, and therefore could not be barred from entering the United States. At the same time though, the Court declined to say whether Puerto Ricans were in fact citizens of the United States, deferring the resolution of that thorny question to some later date.⁷ Like the negotiators of the treaty of peace and the members of the U.S. Congress before them, the Justices of the Court relegated Puerto Ricans (and the inhabitants of the other new territories) to an ambiguous status somewhere between alienage and citizenship.

The events surrounding the *Gonzales* decision have yet to receive the attention they deserve.⁸ For historians of citizenship and its rights, these

(1998); MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004); LUCY E. SALYER, *LAW HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW* (1995).

4. Treaty of Peace Between the United States of America and the Kingdom of Spain (Treaty of Paris), U.S.-Spain, art. IX, Feb. 6, 1899, 30 Stat. 1754 [hereinafter Treaty of Paris]; An Act Temporarily To Provide Revenues and a Civil Government for Porto Rico, and for Other Purposes (Foraker Act), 31 Stat. 77 (1900) [hereinafter Foraker Act].

5. *In re Gonzalez*, 118 F. 941, 942 (C.C.S.D.N.Y. 1902); see *Citizen, but Not a Citizen*, OMAHA WORLD HERALD, Oct. 8, 1902, at 3.

6. *Gonzales*, 192 U.S. at 12.

7. *Id.*

8. The very few scholars who have written about the case include Rogers M. Smith, who discusses it in *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 438–39 (1997). As Smith puts it, the case revealed that the Supreme Court was “willing for Puerto Ricans, like other peoples of color, to be designated ‘American’ so long as what that meant in terms of citizenship status remained unclear.” *Id.* at 438. Smith is right, and in this Article I expand on his analysis. Other brief discussions include CABRANES, *supra* note 1, at 5–6 n.12; NGAI, *supra* note 3, at 100; and Linda K. Kerber, *The Stateless as the Citizen’s Other: A View from the United*

events are of crucial importance, because they call into question a familiar narrative, according to which the Fourteenth Amendment replaced a panoply of individual legal statuses under local, state, and federal law with a single, universal guarantee of birthright citizenship for “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof.”⁹ While the importance of the Fourteenth Amendment cannot, of course, be underestimated, the denial of citizenship to the native inhabitants of the new territories in 1898 nevertheless cast doubt on the purported universality of the Amendment’s guarantee. With the United States’ turn to “formal” empire in 1898—where “formal” empire refers to the annexation and governance of colonies—a new form of exclusion came into being within the legal framework of membership in the United States: this was the first time that the inhabitants of a U.S. territory had been denied citizenship *en masse*, and the legal mechanisms used to effect their exclusion gave sanction to the idea that the United States could continue to expand its sovereign territory without increasing the ranks of U.S. citizens.¹⁰

For historians of gender and citizenship, the *Gonzales* case promises to be a fruitful avenue of research as well. As the transcript of González’s proceedings on Ellis Island reveal, the baby’s father failed to appear at the hearing, and both her pregnancy and his absence played a central role in the immigration authorities’ decision to stop her at the border.¹¹ At stake in González’s detention were therefore not only her ability to move freely into and out of the United States, and her means of subsistence, but also her honor and reputation.¹²

States, 112 AM. HIST. REV. 1, 19–20 (2007). Cabranes’ book, the leading study of the U.S. citizenship of Puerto Ricans, does not discuss the *Gonzales* case at length; it focuses instead on the congressional debates leading up to the grant of citizenship to Puerto Ricans in 1917. For a more extended discussion of the *Gonzales* case, see Erman, *supra* note 2.

9. U.S. CONST. amend. XIV, § 1. For both a discussion and an instance of this standard narrative, see William J. Novak, *The Legal Transformation of Citizenship in Nineteenth-Century America*, in *THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY* 85 (Meg Jacobs et al. eds., 2003); see also JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870*, at 351 (1978).

10. I make this argument in *Empire and the Transformation of Citizenship*, in *COLONIAL CRUCIBLE: EMPIRE IN THE MAKING OF THE MODERN AMERICAN STATE* (Alfred W. McCoy & Francisco A. Scarano eds., forthcoming). In that essay (and briefly below, see *infra* at text accompanying notes 80–83), I address the relationship between this form of exclusion and earlier ones, in particular that of Native Americans, who did not receive U.S. citizenship under the Fourteenth Amendment.

11. *Gonzales* Record, *supra* note 2, at 4–6.

12. A forthcoming article examines these gender dynamics along with other aspects of the case, shedding light on its implications for the meaning of citizenship at the turn of the twentieth century. See Erman, *supra* note 2.

And for constitutional historians of empire and historians of international law, the *Gonzales* case points toward a richer legal history of this period in U.S. history than the existing scholarship has thus far produced—a history that encompasses the encounter among multiple legal traditions (Spanish, U.S., Puerto Rican, Filipino) and the interaction between constitutional and international law, as well as one that takes into consideration voices from the colonial periphery. Constitutional historians of U.S. imperialism have long been interested in extraterritoriality—that is, in the question of whether the Constitution “follows the flag.”¹³ But this is only one aspect, albeit an important one, of the intertwined histories of American constitutionalism and empire. Elsewhere, I have challenged the scholarly consensus that the extraterritorial application of the Constitution was the main issue in the Supreme Court’s jurisprudence on the territories annexed in 1898 (arguing instead that the Court was more concerned with whether the United States retained the power to relinquish the territories altogether—that is, with the problem of an *exit strategy*—than with whether particular constitutional provisions applied in annexed territory).¹⁴ Here, I build on that work, turning my attention from the scholarly emphasis on whether the Constitution “follows the flag” to its unduly narrow focus on “the” Constitution—as if there were only one legal tradition at stake in the constitutional history of American empire.

The constitutional history of American empire involves not just “the” Constitution, but a complex encounter among multiple legal and constitutional traditions as well as a dynamic and mutually constitutive interaction between constitutional and international law. And the educated elite of the colonial periphery, who brought to the debate about imperialism an informed engagement with these multiple legal traditions and with the challenges involved in reconciling them—along with their firsthand knowledge of how U.S. imperialist policies played out, on the ground, in the affected colonies—belong at the center of the story as

13. See, e.g., JUAN R. TORRUELLA, *THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL* 24–84 (1985); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 231 (2002) (noting that the doctrinal transformation that occurred in 1901 “was sufficiently radical to provoke Mr. Dooley’s famous observation that ‘no matter whether th’ constitution follows th’ flag or not, th’ supreme coort follws th’ iliction returns’”); Efrén Rivera Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901–1922)*, 65 REV. JUR. U.P.R. 225, 269 (1996).

14. See Christina Duffy Burnett, *Untied States: American Expansion and Territorial Deannexation*, 72 U. CHI. L. REV. 797 (2005).

much as the imperial agents of the United States.¹⁵ The contributions of the leaders of public opinion in the colonial periphery to the debate about imperialism in the United States have been almost entirely overlooked in mainstream literature on this period. Scholars have, instead, been concerned with unmasking and critiquing the ways in which the United States unilaterally and selectively imposed its own law abroad. But in the process, they have told a story that is too unidirectional; that fails to grapple with what the colonial subjects at the center of the controversy said and did about their own predicament; and that pays insufficient attention to the ways in which U.S. law itself not only had an impact upon other legal traditions, but was transformed under the influence of the legal worlds with which it came into contact.

The civic and political leaders of the colonial periphery brought a transnational perspective to bear on the debate over law and empire, in which they were vigorous (if marginalized) participants. They were not only well versed in the legal systems of Spain and its colonies, but also familiar with the law of the British Empire and with U.S. law, in particular as it concerned the annexation and governance of territories and the various forms of local autonomy possible under American federalism; they were knowledgeable about international law; and they were experts, based on their first-hand experience, in the problems of colonial governance. Their contributions to the debate over imperialism were as informed and sophisticated as those of their counterparts among the political leadership and legal intelligentsia in the mainland United States (if not at times more so). Recovering their contributions to this debate, and incorporating them into the mainstream history of U.S. constitutionalism and empire, brings to life a world of American legal cos-

15. I borrow the phrase "imperial agents" from DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664-1830*, at 3, *passim* (2005), although I define the category more broadly: Hulsebosch uses it to refer to the agents of the British Empire in the American Colonies, whereas I include in it not just individuals sent to govern Puerto Rico and the other U.S. colonies annexed in 1898, but also persons living in the mainland United States who formulated, implemented, or otherwise influenced U.S. imperialist policies. In working on this Article and on the broader project of which it forms part, see *supra* note * and *infra* note 16, I have been influenced by Hulsebosch's work, which deals with the interaction of several forms of Anglo-American constitutionalism in the pre- and post-revolutionary periods (including the constitutionalism of the (then) colonial periphery), as well as by the essays in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* (Mary L. Dudziak & Leti Volpp eds., 2006) [hereinafter *LEGAL BORDERLANDS*] (exploring the role of American law in the construction of borders) and MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2002), especially chapter 2 (exploring the relationship between imperialism and international law in the late nineteenth and early twentieth centuries).

mopolitanism—where “American” is defined broadly to encompass not just the United States but the Americas as a whole, and “legal cosmopolitan” signifies a familiarity and active engagement with multiple legal traditions across and outside national boundaries, as well as within them.¹⁶

In this Article, I begin to recover this neglected aspect of the history of American empire. I focus in particular on the debate over U.S. citizenship in the context of empire, and on the contributions to this debate made by one of these figures from the colonial periphery, who comfortably inhabits the role of an American legal cosmopolitan: Federico Degetau y González.¹⁷ A lawyer, politician, writer, and statesman—and a native of Puerto Rico (like Isabel González, though they were not related)—Degetau was a leading figure in island politics and a veteran of the struggle for equal citizenship for Puerto Ricans under Spain.¹⁸ During the last decades of the nineteenth century, Degetau had become one

16. Indeed, even broadly defined the term “American” may not be broad enough, for the contributions of Filipinos to the debate deserves greater attention as well. As for my use of the term “cosmopolitan,” it overlaps with but is not identical to John Fabian Witt’s. See JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* (2007). Witt’s “patriots and cosmopolitans” reconcile the “indigenous values” of the United States with “ideas and influences from abroad,” in the process of giving shape to their distinctive visions of American nationhood. *Id.* at 12. The American legal cosmopolitans whose stories I seek to recover share a similar affinity for drawing from many traditions in creating a vision of nationhood, but differ in that they belong to a colonial periphery. There, the boundary between “indigenous” and “abroad,” that is, between their “own” traditions and those from “elsewhere,” is often far less clear and far more hotly contested: even the question of what “nation” they belong to remains unresolved. While in this Article I focus on just one of these figures, in other works-in-progress I tell the stories of others. See Christina Duffy Burnett, *The Legalist Origins of an Extralegal Space: The Platt Amendment, Guantánamo, and International Law in the Americas* (unpublished manuscript on file with author) (discussing the Cuban constitutional convention in 1900–1901); Christina Duffy Burnett, *Autonomy Within Empire: Transnational Constitutionalism in Puerto Rico* (unpublished manuscript on file with author) [hereinafter *Autonomy Within Empire*] (discussing the nineteenth and early twentieth century “autonomists” in Puerto Rico).

17. The pronunciation of Degetau’s name remains something of a mystery even in Puerto Rico: one hears “day-hay-TAO,” “day-hay-TOE,” and “day-gay-TOE.” A letter in Degetau’s papers reveals that this confusion dates to Degetau’s own lifetime. Referring to Lola Rodríguez de Tió, a Puerto Rican poet and friend of Degetau’s, its author wrote: “Oh something else. Lola R. de Tió (who is here in New York and who asks me to send you her greetings) has argued frequently to me that your last name is pronounced exactly as it sounds [sic: should be “as it is spelled”], and I have said no: that you are of French descent and that it is pronounced ‘Deguetó’ [day-gay-TOE]. *Am I right?*” Letter from D. Collazo to Federico Degetau y González (Nov. 21, 1903), in Degetau Papers, *supra* note *, 6/1/42. (Degetau was actually of Spanish, English, and German descent. See ÁNGEL M. MERGAL LLERA, *FEDERICO DEGETAU: UN ORIENTADOR DE SU PUEBLO* 30–31 (1944).) Collazo’s original letter was in Spanish except for the phrase “Am I right?,” which he wrote in English. I have not found Degetau’s reply in his papers.

18. See RENÉ TORRES DELGADO, *DOS FILÁNTROPOS PUERTORRIQUEÑOS: SANTIAGO VEVE CALZADA Y FEDERICO DEGETAU Y GONZÁLEZ* (1983); MERGAL LLERA, *supra* note 17.

of the leaders of the “autonomist” movement in Puerto Rico, a political movement consisting primarily of native-born Puerto Ricans seeking to ease the stranglehold of Spanish colonial rule on the island by obtaining greater autonomy from Spain.¹⁹ After the island’s annexation by the United States, Degetau—along with most other autonomist leaders—became a supporter of Puerto Rico’s admission into the Union as a state, believing that statehood would offer Puerto Rico the autonomy it had long been denied by Spain.²⁰ But it soon became clear that the United States had other plans, and Degetau found himself leading the struggle for equal citizenship once again. Elected the island’s first Resident Commissioner (or non-voting delegate) in Washington, he devoted much of his time and energy to assisting constituents who encountered obstacles in their efforts to move to or work in the United States—obstacles arising out of their lack of U.S. citizenship and their ambiguous status as “citizens of Porto Rico.” One of these constituents was Isabel González, in whose quest for citizenship Degetau became involved, as I discuss below.

In Part I, I describe the events leading up to the *Gonzales* decision in greater detail, and discuss the arguments of the lawyers for the parties in the case: Frederic R. Coudert, Jr., who argued on behalf of Isabel González, and Solicitor General Henry M. Hoyt, who spoke for the U.S. government. In this Part, I use the *Gonzales* arguments as a window onto the contested terrain of U.S. citizenship in the late nineteenth and early twentieth centuries. I argue that the United States’ turn to “formal” empire in 1898, combined with the ambiguity of the concept of citizenship even after the adoption of the Fourteenth Amendment, created the occasion for a reconceptualization of the law of political membership in the United States; and I show that the lawyers in the *Gonzales* case recognized this opportunity and tried to take advantage of it: each of them emphasized the remarkable malleability and open-endedness of the con-

19. On the Puerto Rican autonomist movement (and late nineteenth century Puerto Rican history more generally), see, for example, CARLOS D’ALZINA GUILLERMET, EVOLUCIÓN Y DESARROLLO DEL AUTONOMISMO PUERTORRIQUEÑO, SIGLO XIX (1995); EDA MILAGROS BURGOS MALAVÉ, GÉNESIS Y PRAXIS DE LA CARTA AUTONÓMICA DE 1897 EN PUERTO RICO (1997); LIDIO CRUZ MONCLOVA, HISTORIA DE PUERTO RICO (SIGLO XIX) (6th ed. 1970-71); Astrid Cubano Iguina, *Los debates del autonomismo y la Carta Autonómica en Puerto Rico a fines del siglo XIX*, in CENTENARIO DE LA CARTA AUTONÓMICA DE PUERTO RICO (1897-1997), at 17 (Juan E. Hernández Cruz ed., 1998).

20. See BOLÍVAR PAGÁN, 1 HISTORIA DE LOS PARTIDOS POLÍTICOS PUERTORRIQUEÑOS (1898-1956) (1959), at 35 (Platform of the *Partido Republicano*, art. 2, expressing support for statehood) and 49 (Platform of the *Partido Federal*, art. 2, same). Both of these political parties were founded by autonomists.

cept of citizenship, and each tried to persuade the Court (in his own way, and with his client's needs in mind) to craft a legal framework of membership in the United States that would be responsive to the needs of empire.

In Part II, I turn to Degetau. Relying on the important and woefully underutilized archive of his papers, I discuss his encounters with the problem of citizenship leading up to the *Gonzales* case, and then review his efforts in that litigation in some detail.²¹ Degetau offered a pointed critique of the denial of citizenship to Puerto Ricans, drawing on his familiarity with multiple legal traditions and international law as well as on his experience as a native inhabitant of Puerto Rico and a representative of Puerto Rican constituents. In this Part, I argue that the law of U.S. citizenship did not emerge unscathed from the crucible of empire, and that Degetau's contribution to the *Gonzales* case is crucial to seeing why. What Degetau's arguments help us to understand is that the creation of a novel imperial hierarchy of membership in the United States at the turn of the twentieth century did not simply reflect the exportation of metropolitan (U.S.) practices of discrimination into a new colonial periphery; instead, it involved a simultaneous process of *importation*: both the selective importation of certain rules of international law (along with the selective disregard of others), and the importation and adaptation of a new methodology of discrimination, based on birthplace, into U.S. domestic citizenship law—a methodology that ironically was reminiscent of Spanish geographically based discrimination, against which figures like Degetau had struggled for many decades.

In Part III, I discuss the reaction to the *Gonzales* case at the time, and suggest that the legal framework of membership devised for American empire offers an example of the ways in which turn-of-the-twentieth-century imperialism helped shape a modern American nation. In a brief conclusion, I offer observations about the aftermath and significance of the events surrounding the *Gonzales* case.

21. As far as I am aware, no one has written anything in English using this archive except for Sam Erman in his forthcoming article on the *Gonzales* case. See *supra* note 2. Erman's article is part of a larger project that will rely on this and other archival material. Ángel Mergal Llera, who donated the archive to the University of Puerto Rico, relied on it in his biography of Degetau, which was published in Spanish in 1944. See *supra* note 17. Several other histories in Spanish may have used the archive, although they do not clearly identify it in their bibliographical material. See TORRES DELGADO, *supra* note 18; CRUZ MONCLOVA, *supra* note 19.

I. CITIZENS, SUBJECTS, NATIONALS, ALIENS²²

Isabel González had good reason to believe she was not an alien immigrant: Spain had ceded full sovereignty over Puerto Rico to the United States in the treaty of peace (known as the Treaty of Paris) that ended the war in 1898, and as a consequence, Puerto Rico had ceased to be foreign and had become domestic territory of the United States.²³ Nevertheless, she could not be entirely sure that she was a citizen. As noted above, the Treaty of Paris had not promised U.S. citizenship to the native-born inhabitants of the newly annexed territories, including González. Rather, it had provided only that “[t]he civil rights and political status of the native inhabitants of the territories hereby ceded to the United States *shall be determined by the Congress*.” (In contrast, the treaty had given “natives of the Peninsula”—that is, the Iberian Peninsula, or mainland Spain—the right to choose between retaining their Spanish citizenship or becoming U.S. citizens.)²⁴ Two years after the exchange of ratifications, the statute creating Puerto Rico’s civil government (known as the Foraker Act after its main sponsor, Senator Joseph B. Foraker) had perpetuated the uncertainty: instead of bestowing U.S. citizenship upon the inhabitants of Puerto Rico, as early drafts of the bill had done, the final version of the Foraker Act described them as “citizens of Porto Rico”—a phrase no one knew quite how to define.²⁵

As *The New York Times* complained in an article reacting to the legislation, Puerto Ricans could not in any real sense be “citizens of Puerto Rico, which is not a State that can confer citizenship”; they were “not citizens of the United States,” either, the *Times* added, and they were clearly “not aliens,” because they were entitled to the protection of the United States. “What is the status of a Puerto Rican...?” the article asked, before pressing the question in more naked terms: “Is he a vassal

22. I borrow this heading from the title of an article published by González’s lawyer before the Supreme Court issued its decision. Frederic R. Coudert, Jr., *Our New Peoples: Citizens, Subjects, Nationals or Aliens*, 3 COLUM. L. REV. 13 (1903).

23. See Treaty of Paris, *supra* note 4, art. II (ceding sovereignty); *De Lima v. Bidwell*, 182 U.S. 1, 195–200 (1901) (holding that Puerto Rico was no longer “foreign” within the context of tariff law). On the complex and confusing transition of the territories annexed in 1898 from “foreign” to an ersatz “domestic” status, see generally BARTHOLOMEW SPARROW, *THE INSULAR CASES AND THE EMERGENCE OF AMERICAN EMPIRE* (2006); FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001) [hereinafter FOREIGN IN A DOMESTIC SENSE]; Rivera Ramos, *supra* note 13. See also the brief discussion of the *Insular Cases*, *infra* at text accompanying notes 28–29.

24. Treaty of Paris, *supra* note 4, art. IX (emphasis added).

25. Foraker Act, *supra* note 4, at 79.

or a peer?"²⁶ *The Washington Post* later adopted a somewhat more resigned posture toward this mystery: its headline read, "Porto Ricans Just Porto Ricans."²⁷

After the passage of the Foraker Act but before González's voyage to New York, the Supreme Court handed down the first round of decisions in a series that came to be known as the *Insular Cases*, which dealt with the status of the islands annexed in 1898.²⁸ The *Insular Cases* of 1901 held that the newly annexed territories were "domestic" territory but not "part of the United States": they were, in the Court's somewhat oblique wording, "foreign to the United States in a domestic sense."²⁹ This first round of *Insular Cases* did not, however, address the citizenship status of the inhabitants of what eventually came to be known as the "unincorporated" territories.³⁰ That problem remained unsolved when González found herself stranded on Ellis Island.

Yet despite the immigration authorities' bleak assessment of her capacity to avoid becoming a burden on the public fisc, González had relatives living in New York, who upon hearing of her detention promptly turned up at Ellis Island to testify on her behalf.³¹ Although the baby's father did not show up at the hearing, González's aunt and uncle did, and they made themselves responsible for her welfare; her brother testified as well.³²

26. *What Are the Puerto Ricans?*, N.Y. TIMES, Mar. 29, 1900, at 6 (internal quotation marks omitted) (quoting J. Madison Wells).

27. *Not Alien Nor American*, WASH. POST, Oct. 23, 1909, at 1. An editorial in the *Albany Law Journal* proposed a theory to explain what had inspired the curious label, arguing that Puerto Ricans "appear to have been designated citizens of Porto Rico in order to give them a certain foreign quality, in order that their products sent to this country may be liable to import duties." Editorial, *Status of Our Newly Acquired Possessions*, 61 ALBANY L.J. 243, 243 (1900).

28. The "*Insular Cases*" rubric covers a series of cases handed down beginning in 1901 and including *Gonzales*. On precisely which cases belong under the rubric, see SPARROW, *supra* note 23, at 257–58; FOREIGN IN A DOMESTIC SENSE, *supra* note 23, at 389–90; Rivera Ramos, *supra* note 13, at 240–42 & nn. 40–42.

29. *Downes v. Bidwell*, 182 U.S. 244, 341–42 (1901) (White, J., concurring).

30. The term "unincorporated" refers to the fact that these territories have not yet been "incorporated" into the United States for constitutional purposes—though what exactly that means remains unclear (and contested). Since the Court invented the incorporated/unincorporated distinction in 1901, Congress has never actually "incorporated" a territory, unless one counts a tiny guano island called Palmyra (population: 1 caretaker), which the General Accounting Office treated as "incorporated" territory in a 1997 report. See Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, in LEGAL BORDERLANDS, *supra* note 15, at 187, 207–08 (discussing the status of Palmyra and the GAO report). For more on the meaning of the term "unincorporated," see Burnett, *supra* note 14, at 800–01, 806–13, *passim*.

31. See *Gonzales* Record, *supra* note 2, at 4–6.

32. *Id.*

But the immigration authorities responded to their assurances with raised eyebrows. "Where is her husband?" one Inspector Holman demanded of the uncle, Domingo Collazo.

A: He is on Staten Island, working in a linoleon [sic] factory.

Q: Why did he not come here for his wife?

A: He will come to my house.

Q: How do you know, when did you see him?

A: This boy here with me is her brother.

The other inspectors pressed Collazo:

Q (by the Chairman): Why don't [sic] her husband come here for her?

A: Because he is...working in a linoleon [sic] factory.

Q (by Insp. Wright): How long has her husband been here?

A: About six months.

Q: When did you see her husband?

A: About two weeks ago. He is working and could not come today.

Insp. Semsey: But his wife is here and he should come for her.³³

The inspectors unanimously decided not to release González that day, and they were only further emboldened in their conviction that she should be prevented from entering New York when they heard Luis González's testimony two days later:

Q (by Insp. Semsey): Do you know this woman's husband?

A: They are not married....

Q: (by the Chairman): Why does he refuse to come here?

A: Because he does not want to marry her.³⁴

González's brother went on to explain that their aunt was at work on a "reconciliation" between the estranged lovers. The aunt herself then testified, and she promised the inspectors that whatever happened, she and her husband would support González if necessary. But the inspectors

33. *Id.* at 4–5. The transcript renders the uncle's name as "Domingo Colasco." See *id.* at 4. I rely on his Letter to the Editor of *The New York Times*, see *supra* note 1, for the correct spelling of Collazo; in any event, Collazo is a common surname in Spanish, whereas Colasco is not.

34. *Gonzales* Record, *supra* note 2, at 5. The transcript renders the brother's name as "Louis Gonzalles." See *id.* I use the more likely spelling of the name. On the elusive father of the baby, see also *Notes of Recent Decisions*, 38 AM. L. REV. 121, 121–22 (1904) (claiming that González "had come to this country in search of a man who had promised to marry her"); Erman, *supra* note 2, at 7–9, 11, 22.

remained unmoved, and voted unanimously to exclude González “as likely to become a public charge.”³⁵

Yet González’s cause soon attracted several more powerful allies.³⁶ Failing to obtain her release, her relatives hired a former Assistant District Attorney, Charles E. Le Barbier, to file a habeas petition for her.³⁷ After the Circuit Court denied the petition, the Supreme Court’s decision to take up the case drew the attention of the prominent international lawyer Frederic R. Coudert, Jr., of the firm Coudert Brothers, who had argued the first round of the *Insular Cases* before the Court, and who now became González’s lead lawyer. And Federico Degetau, who had been keeping tabs on citizenship cases as they wound their way through the courts, found out about the case and promptly became involved, contributing an *amicus* brief and corresponding with Coudert’s firm about it.³⁸

The lawyers for the parties on both sides of the *Gonzales* case—Coudert on behalf of González and Solicitor General Hoyt on behalf of the government—focused on the undefined character of citizenship, and urged the Court to take advantage of the opportunity to rethink the law of membership writ large in a manner suited to the annexation and governance of colonies. That is, rather than try to offer a simple definition of citizenship and then argue that it either encompassed Puerto Ricans or excluded them, each lawyer instead emphasized the protean nature of the concept, and each then tried to persuade the Court to step in and make strategic use of the ambiguity by creating an altogether novel form of membership, outside the category of citizenship—a form of partial membership, which would confer legitimacy on the United States’ claim of sovereignty over new territories even as it gave sanction to the exclusion of the inhabitants of these territories from full citizenship.³⁹

35. *Gonzales* Record, *supra* note 2, at 5–6.

36. I am not aware of any evidence that Isabel González or her family intended to bring a test case. *Accord* Erman, *supra* note 2, at 2.

37. *See* *Gonzales* Record, *supra* note 2, at 1–3.

38. *See* Letter from H.W. Van Dyke to Degetau (Apr. 4, 1903), in Degetau Papers, *supra* note *, 4/11/122 (writing on behalf of Coudert to say that Coudert “will be pleased to talk with you on the subject” of the case); Letter from G. Conlon to Degetau (Oct. 19, 1903), in *id.*, 4/V/324 (informing Degetau that Coudert would read the draft brief Degetau had sent him upon his return). The Degetau Papers contain miscellaneous materials from various other citizenship cases.

39. John Witt suggested the phrase “strategic ambiguity” to describe the characteristic of the law of empire that I discuss in this and other work. *See* Christina Duffy Burnett, *The Edges of Empire and the Limits of Sovereignty: American Guano Islands*, in *LEGAL BORDERLANDS*, *supra* note 15; Burnett, *supra* note 14.

Even González's lawyer Coudert—whose job it was to argue that González was a U.S. citizen—encouraged the Court to make strategic use of the ambiguity in the concept of citizenship. Coudert did so in an argument in the alternative (to which he devoted a substantial portion of his brief, perhaps sensing—correctly—that his primary argument would not persuade the Court). If, he argued, the Court were to reject his principal contention, concluding instead that Puerto Ricans were not U.S. citizens, then at the very least it should acknowledge that they were not aliens, either. Instead, it should hold that they occupied a status somewhere between citizenship and alienage. And in the process, Coudert proposed, the Court should coin a formal legal designation to describe this intermediate status: "national."⁴⁰ The term "national," Coudert explained, was in use by European countries, and had been accepted by international lawyers. It simply meant the same thing as "subject," he elaborated, but was an improvement over that term, because it had "a less arbitrary sound."⁴¹ Apparently, as Coudert saw it, an international legal pedigree could confer legitimacy on an otherwise questionable status.

Coudert's effort to persuade the Court to reconceptualize the law of membership along the lines of international law rested on twin pillars: the ambiguity of citizenship and the opportunity of empire. "No question could have arisen here had it not been for the ambiguous meaning of the term citizen in American law," he declared in his brief in the *Gonzales* case.⁴² "To call [the Puerto Rican] a citizen when we are in hopeless disagreement as to the meaning of that term will only result in creating added confusion."⁴³ This ambiguity, Coudert suggested, arose out of the uncertainty concerning what rights belonged to citizens. "What these rights of citizens of the United States are, it is very difficult

40. Brief for Petitioner-Appellant submitted by Frederic R. Coudert, Jr., Paul Fuller, and Charles E. Le Barbier, in *Gonzales* Record, *supra* note 2, at 10, 11 [hereinafter Brief for Petitioner]. In the discussion that follows, I draw on this brief and on three other sources in which Coudert developed these arguments: the transcript of Coudert's oral argument, in *Gonzales* Record, *supra* note 2 [hereinafter Argument for Petitioner]; Coudert, *supra* note 22; and Brief for Plaintiffs in Error, *De Lima v. Bidwell*, 182 U.S. 1 (1901), reprinted in ALBERT H. HOWE, THE INSULAR CASES: COMPRISING THE RECORDS, BRIEFS, AND ARGUMENTS OF COUNSEL IN THE INSULAR CASES OF THE OCTOBER TERM, 1900, IN THE SUPREME COURT OF THE UNITED STATES, INCLUDING APPENDIXES THERETO, H.R. DOC. NO. 509, at 512 (1901) [hereinafter *De Lima* Brief] (addressing the issue of citizenship in detail, although it was not directly at issue in those cases, and was not resolved by the Court).

41. Argument for Petitioner, *supra* note 40, at 53.

42. Brief for Petitioner, *supra* note 40, at 17.

43. *Id.* at 4.

to determine.... [They] are almost impossible of definition."⁴⁴ Recent Supreme Court doctrine, he observed, tended toward the conclusion that the states were the primary sources and guarantors of the rights of citizenship (and here he cited the *Slaughter-House Cases*), while a review of the constitutional text itself revealed that it conferred precious few rights to *citizens* in particular, as opposed to *persons* in general.⁴⁵ "The only positive right conferred by the Constitution upon a citizen as such," Coudert wrote, "seems to be the right to sue in a Federal Court."⁴⁶ Beyond that, one would comb the text of the Constitution in vain in search of the rights of citizenship *per se*.⁴⁷

Having thus established that the Constitution was a virtual blank slate when it came to defining citizenship, Coudert took upon himself the task of clarification. A citizen in the "broad sense," he explained, was essentially the same thing as a "subject" (echoing what had become the familiar refrain that a "citizen" was nothing more than the "subject" of a

44. *Id.* at 23, 24.

45. *Id.* at 24–25; *Slaughter-House Cases*, 83 U.S. 36, 52–54 (1873).

46. Brief for Petitioner, *supra* note 40, at 24–25. Turning to the rights of U.S. citizens under state law, Coudert noted that in some of them there still survived a remnant of the "old and barbarous *Droit-d'aubane*," pursuant to which an alien holding real estate was subject to an action of forfeiture; but even this, he added, was not so much a right of citizenship as opposed to a disability of alienage. *Id.* at 25.

47. While the Constitution protects the "privileges and immunities" of citizens, it does not define them. See U.S. CONST. art. IV, §2, cl. 1; see also *id.* amend. XIV, §1. However, the notion that the Constitution defines the rights of citizenship persists even today. See, e.g., NGAI, *supra* note 3, at 100; Novak, *supra* note 9, at 109. Novak quotes, in support of the claim that the Fourteenth Amendment defined the rights of national citizenship, the second sentence of Section 1 of the Amendment: "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Novak, *supra* note 9, at 109. But this language refers to the "privileges and immunities of citizens of the United States" without defining them, and guarantees rights of life, liberty, property, due process, and equal protection to *persons*, not *citizens*. Ngai, in turn, asserts that as a result of their lack of citizenship, nationals were denied the rights of voting representation and jury trial. NGAI, *supra* note 3, at 100. But this claim, which rests on the assumption that the Constitution guarantees these rights to citizens, is not quite right either. The Constitution does not give citizens the right to vote, but rather only protects their right to vote on an equal basis as other citizens in the same jurisdiction; and nationals were denied voting rights under state law because most states in the early twentieth century conditioned the right to vote on U.S. citizenship (and by 1926, all of them did). See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* tbl. A.12 (2000) ("States with Special Provisions Affecting Aliens and Immigrants, 1870-1926"). As for the right to a trial by jury, Ngai has in mind several of the *Insular Cases* dealing with jury trial rights. NGAI, *supra* note 3, at 100. But these cases distinguished for these purposes between incorporated and unincorporated territories, not between citizens and nationals (and the text of the Sixth Amendment itself does not limit this right to citizens). See Burnett, *supra* note 14, at 848–52.

republic).⁴⁸ Even the Supreme Court had recognized that the two terms were essentially synonymous: as *Minor v. Happersett* (1874) put it, the term “citizen” had come to be “more commonly employed” than the term “subject” only because the former was “better suited to the description of one living under a republican government.”⁴⁹ Or, as a scholar of citizenship had written not long before, the word “citizen” had come to be seen as preferable to the word “subject” because the latter “has become historically associated with the theories of feudal and absolute monarchy, and has thus fallen into disfavor.”⁵⁰ In other words, the shift from “subject” to “citizen” marked the shift from feudal monarchy to constitutional republic, but both simply designated a person living under a particular sovereignty, whether monarchical or republican.

It was but a small step from the assertion that citizenship and subjection were roughly synonymous to the suggestion that even the legal framework of membership in the United States, which was supposed to consist of a single, uniform status—citizenship—could actually encompass “various gradations or subdivisions of subjection.”⁵¹ Contrary as all of this might seem to the republican ideal of citizenship, Coudert noted, there were of course examples of such subjection in U.S. history. Drawing his examples from Supreme Court cases, he pointed to the notorious *Dred Scott* case (1857), which held that blacks, even when free, were not citizens of the United States (a holding overruled by the Fourteenth Amendment), and *Elk v. Wilkins* (1884), which held that, even after the adoption of the Fourteenth Amendment, Native Americans could not become U.S. citizens by voluntarily separating from their tribes and taking up “residence among the white citizens of a State,” but only by a congressional act of naturalization (a holding that the Indian Citizenship Act of 1924 would make moot by conferring U.S. citizenship on all Na-

48. Brief for Petitioner, *supra* note 40, at 6. On the shift from “subject” to “citizen,” see, for example, *Minor v. Happersett*, 88 U.S. 162, 166 (1874); George A. Malcolm, *The Status of the Philippines*, 14 MICH. L. REV. 529, 546 (1916) (noting that the word “subject” had been discarded “as not suited to one living under a republican form of government”); Dudley O. McGovney, *American Citizenship*, 11 COLUM. L. REV. 231, 242 (1911) (describing the term “subject” as an “odious term” not appropriate in a republic). For the claim that this transition occurred during the American Revolution, see KETTNER, *supra* note 9, at 173–209. As Kettner puts it, “[c]itizenship supplanted subjectship as the source of protection shifted from George III to the independent states.” *Id.* at 187.

49. Brief for Petitioner, *supra* note 40, at 20 (quoting *Minor*, 88 U.S. at 165–66).

50. *Id.* at 20 (quoting Munroe Smith, *Nationality, Law of*, in 2 CYCLOPÆDIA OF POLITICAL SCIENCE, POLITICAL ECONOMY, AND OF THE POLITICAL HISTORY OF THE UNITED STATES. BY THE BEST AMERICAN AND EUROPEAN WRITERS. 941, 942 (John J. Lalor ed., 1883)); see also Argument for Petitioner, *supra* note 40, at 51.

51. *Id.* at 27.

tive Americans).⁵² But even as Coudert alluded to this past, he sought to distance his own proposal from it, making clear to the Court that it need not repeat past mistakes; one would not, he declared, want to revive either of these ignominious precedents.⁵³ This, of course, was precisely what was attractive about the category of the “national”: it was a modern term, newly coined by experts at the vanguard of international law, and, as such, free (in Coudert’s opinion) from tatty historical baggage. Unless the Court adopted this new legal designation to describe the status of Puerto Ricans and Filipinos, Coudert insisted, it would be “forced to have recourse to the two precedents in our history of which we are least proud, and to introduce for the third time into our system a class of persons whom it has always been our object to be free from.”⁵⁴ But as Coudert framed the issue, imperialism provided the opportunity (and international law the means) to bring the legal hierarchy of political membership up to date.

It would only be appropriate, Coudert added, that these developments reflect the difference between “expansion,” which was a thing of the past, and “imperialism,” which was the way of the future.⁵⁵ Indeed, that there were so few previous instances of classes of persons who were subjects but not citizens of the United States was no doubt due, Coudert speculated, to the fact that “we have been so little brought in contact with races inferior to us in development and civilization.”⁵⁶ But all that had changed. Offering a theory of empire to go with his theory of citizenship, Coudert argued that the United States had now made the transition from “expansion” to “imperialism,” and that it must consequently turn for guidance to the practices of other nations that have “been brought into contact with uncivilized or semi-civilized tribes or people who became wholly subject to their jurisdiction, and whose legal status it consequently was necessary to solve.”⁵⁷ Elsewhere, Coudert had elaborated on the difference between “expansion” and “imperialism”—and he did not mince words:

The Nomad tribes of America presented indeed a problem, but only a passing one. North America could not for mere sentimen-

52. *Id.* at 28–32; see U.S. CONST. amend. XIV; An Act To Authorize the Secretary of the Interior to Issue Certificates of Citizenship to Indians (Indian Citizenship Act), 43 Stat. 253 (1924); *Elk v. Wilkins*, 112 U.S. 94 (1884); *Scott v. Sandford*, 60 U.S. 393 (1857).

53. Brief for Petitioner, *supra* note 40, at 39.

54. *Id.*

55. *Id.* at 4; see also *id.* at 32; Coudert, *supra* note 22, at 13–14.

56. Brief for Petitioner, *supra* note 40, at 32.

57. *Id.* at 33.

tal reasons remain as a game preserve forever, in order that a few hundred thousand red-skinned hunters might indulge their taste for the chase and gain subsistence thereby as they had done in the past. Necessity and the ruthless progress of civilization compelled the opening up and exploiting of the American continent by the overflowing population of Old Europe. The Indian problem was met by taking the land, whether as the result of a bargain or through force as the white man needed it, and the relations of the newcomer with his Nimrod predecessor were gradually reduced to a minor question through the agencies of fire water, gunpowder and well-intended but unwise policy. The logic of events is often more powerful than that of Aristotle.⁵⁸

Meanwhile, the "populations taken over from France and Mexico were insignificant in number. They were, moreover, largely of Caucasian race and civilization, and a growing stream of immigration soon made the new lands thoroughly American...." Thus it was possible to solve the problem of their legal status according to an "underlying theory" of "expansion rather than imperialism." But new circumstances called for a new approach: "[T]he problem of to-day cannot be solved either by extermination, as in the case of the Indian, nor [sic] by assimilation, as in the case of the few Frenchmen and Spaniards."⁵⁹ Or as he summed it up in his brief, "[o]ur former growth has been rather by expansion and assimilation," but now it must occur "through the method of imperialism, *i.e.*, the domination over men of one order or kind of civilization, by men of a different and higher civilization."⁶⁰

Building on this argument, Coudert appealed to the idea that the United States had become a global power and therefore must behave like one by following the example of European imperial powers. Citing the annexation of Algeria by France, he explained that Algerians had become French *subjects*, not *citizens*, adding that the situation there was quite similar to the one now before the Court, for neither the executive nor the legislative authorities in France had given the Algerians the rights of citizenship, and in the face of this inaction, a French court had declared that Algerians could not be treated as aliens, but must be treated at least as subjects.⁶¹ French annexations of territory in China and the Pacific had had similar consequences: the affected populations

58. Coudert, *supra* note 22, at 13–14.

59. *Id.* at 14.

60. Brief for Petitioner, *supra* note 40, at 32.

61. *Id.* at 33–34.

had become “French subjects” and acquired “French nationality,” but they had not become French citizens (and they continued to be governed largely by their own laws).⁶² These and other examples demonstrated that (in the words of another international lawyer) “it is no longer the custom, even after the conquest of a country, to reduce its inhabitants to a condition inferior to that of the conquering country.”⁶³ Instead, a transfer of sovereignty implied a change in nationality and the inhabitants of such territory became “nationals” of the new sovereign.

How exactly calling them “nationals” would improve their lot or rescue them from a condition inferior to that of citizens was not entirely clear.⁶⁴ But that was the point: Coudert’s goal was to demonstrate to the Court that it need not rid the law of membership of its ambiguity altogether, but simply make strategic use of it, replacing what had been a vacuum (*neither* citizens *nor* aliens, but *what?*) with affirmative legal content (“nationals”) and thereby making what seemed like an act of *omission* (the failure to confer citizenship) into an act of *commission*: the conferral of the status of “nationals,” a status invested with legitimacy by virtue of its international pedigree. Instead of simply being denied the status of citizenship, colonial subjects would be given their own special status—one that moreover gestured at inclusion because it signaled absorption into the sovereign domain of the United States (even if not the acquisition of citizenship).

The Circuit Court had overlooked the possibility of a status between citizenship and alienage, Coudert speculated, because it had mistakenly clung to the assumption that there was no such middle ground.⁶⁵ Of course, this was a reasonable assumption in a post-Fourteenth Amendment world, as Coudert understood perfectly well; hence the necessity of a novel legal term to describe the unfamiliar middle ground. But Coudert was cautious not to go too far in emphasizing the novelty of his proposal. The basic thrust of his argument was that he was *not* urging

62. *Id.* at 34–36.

63. This quotation appeared in Coudert’s *De Lima* Brief, *supra* note 40, at 560 (emphasis omitted), which Coudert incorporated by reference in his *Gonzales* brief. Brief for Petitioner, *supra* note 40, at 36. The quoted statement was from William Beach Lawrence’s Appendix to Henry Wheaton’s *ELEMENTS OF INTERNATIONAL LAW* 631 (1855), which in turn quoted [JEAN JACQUES GASPARD] FOELIX, *De la naturalisation collective et de la perte collective de la qualité de Français.—Examen d’un arrêt de la cour de cassation du 13 janvier 1845*, 2 *REVUE DE DROIT FRANÇAIS ET ÉTRANGER* 321, 328 (1845).

64. Although Coudert did not say so explicitly, the clear implication of the argument was that nationals would at least have the right to enter the United States, under the immigration laws then in effect.

65. Brief for Petitioner, *supra* note 40, at 6–7.

the Court to make up the law out of whole cloth, but rather only helping it to recognize legal developments in the international arena and encouraging it to adopt them into domestic law in a manner suited to the needs of American empire.

Along the same lines, Coudert asserted that while the Treaty of Paris perhaps had not “naturalized” González, surely it had “nationalized” her.⁶⁶ Coudert referred to “nationalization” by treaty without elaboration, as though it were a familiar phenomenon; but of course collective “nationalization” was not a recognized alternative to collective “naturalization”—at least not in U.S. law. By alluding to “nationalization” by treaty as if it were a familiar occurrence, Coudert was evidently hoping to ease the Court into making this new form of partial membership (that of the “nationalized” though not “naturalized” person) an accepted part of the domestic legal framework. The people of the annexed territories, as he summed up the point, had been converted

from foreigner to something else. And whether you call that something else ‘subject,’ as the French have called it, in their jurisprudence, ‘*sujet Français*,’ or whether you call it liegeman, which is a prettier expression, or whether you call it national, which is an international law expression, is a matter of indifference.⁶⁷

On this last point at least, the parties agreed. “This is an inquiry in which uncompromising insistence on mere words must be avoided,” declared Solicitor General Hoyt in his brief for the United States, which like his counterpart’s, emphasized the malleability and open-endedness of the concept of citizenship. “[T]hese logical categories are neither mutually exclusive nor completely comprehensive.... All these words are *inter se* synonymous, correlative, or antithetic, but not completely so. The meanings are relative rather than absolute; they shade off into each other, and the outlines of the delimitation are not sharp, but hazy.”⁶⁸ This strikingly nuanced and subtle view of the indeterminacy and porousness of legal boundaries represented Hoyt’s own effort at making

66. *Id.* at 7, 23, 36.

67. Argument for Petitioner, *supra* note 40, at 64. In using the term “liegeman,” Coudert was alluding to an exchange he had had moments earlier with Justice William R. Day, who expressed his preference for that term over the term “subject,” which he did not believe appropriate under U.S. law. As Day put it, “You will probably not find that term [“subjection”] in any American discussion of the relations between the people of either the United States or its territories.” *Id.* at 55.

68. Brief for the United States, submitted by Solicitor General Henry M. Hoyt, in *Gonzales Record*, *supra* note 2, at 6 [hereinafter Brief for the United States].

strategic use of the ambiguity of citizenship; such vague terms would lend themselves easily to manipulation, rendering the law of membership flexible in the face of whatever unforeseen contingencies the government's new policies might bring. Like Coudert, Hoyt emphasized the manipulability of the legal terminology at issue in the case, but he did so not in order to propose a clarification of the law; rather, he sought to underscore the benefits of legal ambiguity from the perspective of the government. Ambiguity in the law, used strategically, would maximize the government's discretion, giving it as free a hand as possible in the governance of its new colonies while preserving its legitimacy.

Even the term "subject" need not be burdened with outmoded connotations, according to Hoyt. "[T]here is no need for alarm over that term," Hoyt explained, addressing whether González was a "subject" of the United States:

She is *subject*, in the adjective use of the word, to the sovereignty and laws, to the jurisdiction of the United States as citizens are, and as unqualified aliens are.... She is not *a subject* in the substantive use of the term simply because in ordinary parlance that word has a conventional meaning and denotes a constituent member of the body politic in a monarchical or imperial government.⁶⁹

In contrast, the term "*citizen*...denotes a member of a republic," while "'nationals'...signifies all persons who belong to, who constitute objects of, any particular government, whether they are citizens, subjects, or in some intermediate category." And yet these definitions were merely "a matter of terminology," Hoyt insisted, and "the growing use of the noun *national* does not throw any particular light upon our investigation."⁷⁰ Hoyt's emphasis on the fluidity of the boundaries around different forms of membership suggested that no amount of legalistic fine-tuning could (or should) diminish the government's discretion. Such indeterminacy, if used wisely, could ensure that the law of membership would accommodate the exigencies of empire.

Even assuming that the people of the new territories were so-called nationals, he went on, the question remained whether they were subject to the disabilities of alienage.⁷¹ And the answer, according to Hoyt, was that they were.⁷² Indeed Hoyt conceded that "these people have become

69. *Id.* at 12.

70. *Id.* at 12–13.

71. *Id.* at 13.

72. *Id.* at 28, *passim*.

nationals.”⁷³ But, he added, their status as nationals did not mean that they had “left their alienage by birth so far or so fully” that they had escaped its disabilities.⁷⁴ All it meant was that their “absolute foreign status has been measurably qualified.”⁷⁵ Describing the various ways in which the inhabitants of earlier territories had been admitted into citizenship, he argued that, together, these precedents established a “fundamental principle”: that there was “a *hiatus* between a status wholly foreign and one wholly domestic until full incorporation of the inhabitants as citizens.”⁷⁶ A somewhat analogous hiatus, argued Hoyt, could be found in the status of the American Indian: as an 1856 opinion by Attorney General Caleb Cushing had put it, it was “a mistake to suppose that *alien*, as opposed to *citizen*, implies *foreigner*, as respects the country.... The simple truth is plain, that the Indians are the *subjects* of the United States, and therefore are not, in mere right of home birth, citizens of the United States.”⁷⁷

Then again, Hoyt went on, not even citizens constituted a single class within clear-cut boundaries; rather, the term “citizen” itself had a dual meaning, referring to those who enjoy political rights and those who do not.⁷⁸ Moreover, if the United States were to follow the examples of

73. *Id.* at 28.

74. *Id.*

75. *Id.* at 36.

76. *Id.* at 18 (emphasis added). Hoyt’s use of the term “incorporation” here alluded to the language of nineteenth century treaties of annexation, which contained provisions concerning the “incorporation” of territorial inhabitants into the rights and privileges of citizenship. That term had been applied to the territory itself, instead of its inhabitants, in the *Insular Cases* (1901), which, as noted above, held that Puerto Rico, the Philippines, and Guam had not been “incorporated” into the United States. (This holding explains why they came to be known as “unincorporated” territories). See TORRUELLA, *supra* note 13, at 53–56; SPARROW, *supra* note 23, at 90–93; Cleveland, *supra* note 13, at 223–26; Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented*, in FOREIGN IN A DOMESTIC SENSE, *supra* note 23, at 1, 9–10 (discussing the doctrine of territorial incorporation in the *Insular Cases*); Rivera Ramos, *supra* note 13, at 240–61.

77. Brief for the United States, *supra* note 66, at 25 (quoting 7 Op. Att’y Gen. 746, 749 (1856)). Cushing’s opinion further suggested that Native Americans be called “denizens” or “domestic aliens”—whatever would convey that they were “not the sovereign constituent ingredients of the government.” Relation of Indians to Citizenship, 7 Op. Att’y Gen. 746, 749 (1856).

78. Brief for the United States, *supra* note 68, at 31–32. Before proposing the term “national,” Coudert had similarly distinguished between two kinds of “citizen,” referring to a narrow and a “broader” sense: (1) the former referred to a holder of political rights or privileges; that is, “one who has a homeopathically diluted dose of sovereignty,” and (2) the latter designated a member of a nation, identical with a subject at common law. See *id.* at 6 (internal quotation marks omitted). Another sense in which citizenship in the United States was “dual” of course was in the state/federal sense; Coudert alluded to this in passing, see *supra* note 45 and accompanying text (discussing the *Slaughter-House Cases*), but neither brief discussed it at much length.

France and Germany, which “[i]n order to avoid the ambiguity due to this dual sense...make use of the word ‘nationals,’” this would not end the discussion, because the category of “nationals” itself would then have to be divided into two classes: one class would consist of citizens, and the other class, lacking in political rights, would include “women, minors, and persons who, for a variety of reasons other than alienage, do not possess such rights.”⁷⁹ That is, the terms used to designate different statuses in the hierarchy of political membership would not (and should not) dictate the content of the rights and privileges attaching to any given status; the government’s discretion with respect to such rights and privileges would (and should) remain undisturbed by the niceties of legal terminology.

Hoyt, like Coudert, was right in asserting that there were earlier examples of partial membership in U.S. history. But there were also significant differences between the citizenship status of the inhabitants of earlier territories and Native Americans on the one hand, and the citizenship status of the inhabitants of the unincorporated territories on the other. For one thing, all of the earlier territories except Alaska had been annexed prior to the Fourteenth Amendment, such that U.S. citizenship would in any event have had an altogether different valence, and indeed would likely have been of secondary importance to statuses acquired at the state and local level.⁸⁰ For another, whatever hiatus had existed in the earlier territories resulted not from a denial of citizenship of indefinite duration, but simply from whatever temporary delay was inherent in the transition from foreign to domestic status.⁸¹ As for Native Ameri-

79. Brief for the United States, *supra* note 68, at 32 (citing *Minor v. Happersett*, 88 U.S. 162 (1874)).

80. On the annexation of earlier territories (as well as on their governance and admission into statehood), see generally MAX FARRAND, *THE LEGISLATION OF CONGRESS FOR THE GOVERNMENT OF THE ORGANIZED TERRITORIES OF THE UNITED STATES, 1789-1895* (1896); GRUPO DE INVESTIGADORES PUERTORRIQUEÑOS, *BREAKTHROUGH FROM COLONIALISM: AN INTERDISCIPLINARY STUDY OF STATEHOOD* (1984) [hereinafter *BREAKTHROUGH*]; D.W. MEINIG, *THE SHAPING OF AMERICA: A GEOGRAPHICAL PERSPECTIVE ON 500 YEARS OF HISTORY* (1986, 1993, 1998) (first three volumes). On the relative unimportance of federal citizenship relative to other statuses prior to the Fourteenth Amendment, see Novak, *supra* note 9.

81. On citizenship in the earlier territories, see generally *BREAKTHROUGH*, *supra* note 80. The inhabitants of the territories annexed after the war with Mexico in 1846-1848 were given one year to choose whether to become U.S. citizens or remain Mexican citizens; the subjects of Russia living in Alaska were given three years to choose whether to become U.S. citizens or remain Russian citizens. See Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, U.S.-Mex., art. VIII, May 30, 1848, 9 Stat. 922 [hereinafter *Treaty of Guadalupe Hidalgo*]; Treaty Concerning the Cession of the Russian Possessions in North America by His Majesty the Emperor of All the Russias to the United States of America, U.S.-Russ., art. III, May 28, 1867, 15 Stat. 539 [hereinafter *Alaska Treaty*]; see also *infra* notes 150-51 and accompanying

cans, while there was something to this analogy, it nevertheless had limited value. The exclusion of Native Americans from citizenship rested on the rationale that they owed allegiance to their tribes rather than to the United States—that is, that they belonged to different nations, even if these were “domestic dependent nations”—whereas Puerto Ricans and Filipinos owed allegiance to the United States, and in this sense (a sense ordinarily relevant to citizenship) belonged to that nation.⁸² And as Hoyt himself acknowledged, the territories annexed in 1898 were different because in their case, “the hiatus between alienage and citizenship has been preserved by positive law” (by which Hoyt evidently meant the Foraker Act, which had used the designation “citizens of Porto Rico” to fill the gap between full citizenship and complete alienage).⁸³

In short, both Hoyt’s and Coudert’s arguments underlined the persistent ambiguity of the concept of citizenship and both encouraged the Court to take advantage of the opportunity afforded by the United States’ turn to empire to fill the void left by the Fourteenth Amendment (albeit toward different ends). Although Coudert urged the Justices to reach a decision in favor of U.S. citizenship for Puerto Ricans, while Hoyt pushed in the opposite direction towards a decision favoring a status of alienage, their opposing views converged when it came to highlighting, and trying to make the most of, the opportunity presented by empire. Now, went the argument, was the time to rethink the law of citizenship. Now was the time to make space for a legal hierarchy of political membership that would reflect the realities of the nation’s new role as an imperial power of global consequence.

II. FROM NATIVES TO CITIZENS

To Federico Degetau, in contrast, the problem of equal citizenship in the context of empire was not new and the ambiguity of partial membership was a familiar predicament holding little appeal.⁸⁴ Born in 1862 in the city of Ponce, on the southern coast of Puerto Rico, Degetau was one of the native inhabitants of Puerto Rico who were excluded from

text (discussing Alaska Treaty).

82. The phrase “domestic dependent nations” comes from *Cherokee Nation v. Georgia*, 30 U.S. 1, 14 (1831).

83. Brief for the United States, *supra* note 68, at 54.

84. For biographies of Degetau, see MARGAL LLERA, *supra* note 17, and TORRES DELGADO, *supra* note 18; for sources on late nineteenth century Puerto Rican history, see *supra* note 19.

U.S. citizenship by the Treaty of Paris and the Foraker Act.⁸⁵ But long before then, Degetau had experienced second-class citizenship under the Spanish colonial regime.

Several years after the death of his father in 1863, Degetau and his mother relocated to the capital of Puerto Rico, the city of San Juan; when Degetau was a young boy, they moved again, this time to Spain, where they lived first in Cádiz, then in Barcelona, and finally in Madrid.⁸⁶ After initiating studies in both civil engineering and medicine, he changed his mind and decided to study law, which in nineteenth century Spain centered on the study of natural law and on the works of Scholastic writers; in 1888, he earned the title of *licenciado* (attorney) in civil and canon law.⁸⁷ Meanwhile Degetau became fluent in English and French, in addition to Spanish; learned to play the piano (from his mother, an accomplished pianist herself); and took up painting and writing, with the latter activity becoming a lifelong passion.⁸⁸

While in Madrid, Degetau met and became friends with Román Baldorioty de Castro, a leading Puerto Rican educator and politician, who had moved there temporarily for health reasons.⁸⁹ Before the age of 20, Degetau was inducted as an honorific member into the Masonic Lodge *El Porvenir* ("The Future") in Madrid, and was named the president of the Section of Moral Sciences of the Spanish Society of Anthropological Sciences, which in 1883 selected Degetau to meet with Victor Hugo as part of an effort to form a league for the abolition of the death penalty.⁹⁰ In 1888, he and his mother traveled to Puerto Rico, where Degetau would remain for two months before returning to Madrid. Among the friends and relatives who welcomed them back to the island was Baldorioty, who had by now become the unofficial leader of the autonomist movement in Puerto Rico, and Aristides Díaz Díaz, Baldorioty's son-in-law and another important autonomist, who would accompany Degetau on a tour of the island.⁹¹

85. See MERGAL LLERA, *supra* note 17, at 30 (birth in Ponce); Foraker Act, *supra* note 4, at 79 (denying citizenship).

86. See MERGAL LLERA, *supra* note 17, at 36 (moved to San Juan at age 6), 39 (moved to Spain at age 12), 40–41 (lived in Cádiz, Barcelona, and Madrid).

87. See *id.* at 41 (discovers interest in law), 46 (completes studies in law).

88. See TORRES DELGADO, *supra* note 18, at 23 (languages); MERGAL LLERA, *supra* note 17, at 41 (arts; writing), 118 (bibliography of Degetau's literary works).

89. See MERGAL LLERA, *supra* note 17, at 41.

90. See *id.* at 44–45.

91. See *id.* at 47–48.

The autonomists were dedicated to reforming the colonial system imposed on Puerto Rico by Spain.⁹² Under that system, Spanish officials hailing from the Iberian Peninsula exercised a virtual monopoly on governmental power to the almost entire exclusion of the native-born elite, or *creoles* (to use a term that usually referred to Spaniards of European descent born in the Spanish-American colonies, which in Puerto Rico came to refer simply to Spaniards born in the colony).⁹³ To make matters worse, the island was governed by Spanish-appointed military governors with broad powers. Puerto Rico's governors took their liberties with this discretion, using it as license to persecute autonomists, who

92. See sources cited *supra* note 19; see also JAVIER ALVARADO, *CONSTITUCIONALISMO Y CODIFICACIÓN EN LAS PROVINCIAS DE ULTRAMAR: LA SUPERVIVENCIA DEL ANTIGUO RÉGIMEN EN LA ESPAÑA DEL XIX* (2001) (offering a legal history of colonial autonomy from the Spanish perspective).

93. See, e.g., Stuart B. Schwartz, *Spaniards, Pardos, and the Missing Mestizos: Identities and Racial Categories in the Early Hispanic Caribbean*, 71 *NEW WEST INDIAN GUIDE/NIEUWE WEST-INDISCHE GIDS* 5, 5 (1997) ("The traditional usage of the term [*criollo*] in colonial mainland Spanish America [was] as a designation a [sic] white person of European heritage born in the colony," though Father Agustín Iñigo Abbad y Lasierra wrote about Puerto Rico in the 1780s that "[t]hey give the name *criollo* without distinction to all those born on the island regardless of the caste or mixture from which they derive."). A large literature deals with creole identity and creole-peninsular relations in the Spanish empire. See, e.g., JAIME E. RODRÍGUEZ O., *THE INDEPENDENCE OF SPANISH AMERICA* (1998); Anthony Pagden, *Identity Formation in Spanish America*, in *COLONIAL IDENTITY IN THE ATLANTIC WORLD, 1500-1800*, at 51 (Nicholas Canny & Anthony Pagden eds., 1987). For an unusual and fruitful approach to the topic of creole-peninsular relations, grappling with the problem of the relationships between creole and peninsular historians and their efforts to write their own pasts, see JORGE CAÑIZARES-ESGUERRA, *HOW TO WRITE THE HISTORY OF THE NEW WORLD: HISTORIES, EPISTEMOLOGIES, AND IDENTITIES IN THE EIGHTEENTH-CENTURY ATLANTIC WORLD* (2001). On creoles in Puerto Rico, see, for example, Francisco A. Scarano, *The Jibaro Masquerade and the Subaltern Politics of Creole Identity Formation in Puerto Rico, 1745-1823*, 101 *AM. HIST. REV.* 1398 (1996). For different perspectives on the role of a distinct creole national identity in Spanish American independence, compare BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (1983) (arguing that creole national identity took shape before independence and was a major contributing factor in the break with Spain), with JEREMY ADELMAN, *SOVEREIGNTY AND REVOLUTION IN THE IBERIAN ATLANTIC* (2006) (questioning the extent to which a distinct creole national identity developed prior to independence). Whatever the answer to this question, a symbolically important clash between creoles and peninsulars, which unfolded just as the struggle for independence in Latin America was getting underway, occurred at the constitutional convention that produced the Spanish Constitution of 1812; delegates from the Spanish American colonies were invited to participate in this convention, but were not given their proportionate share of representatives, and they proceeded to be outvoted by the peninsular bloc on a series of issues concerning the colonies. See generally MARIE LAURE RIEU-MILLAN, *LOS DIPUTADOS AMERICANOS EN LAS CORTES DE CÁDIZ: IGUALDAD O INDEPENDENCIA* (1990); MARÍA TERESA BERRUEZO, *LA PARTICIPACIÓN AMERICANA EN LAS CORTES DE CÁDIZ, 1810-1814* (1986); Christina Duffy Burnett, *The American Delegates at the Cortes de Cádiz: Citizenship, Sovereignty, Nationhood* (1995) (unpublished M. Phil. thesis, Cambridge University) (on file with author).

were regarded not only as troublemakers but, what was considered far more threatening, as closet separatists—an accusation that had little basis in the reality of Puerto Rico, where separatism enjoyed scant support.⁹⁴ In 1887, a Cuban court had declared the legality of *autonomismo* (in a case involving a prosecution for the publication of an autonomist newspaper).⁹⁵ A Puerto Rican court soon followed suit, and the emboldened autonomists then formed the *Partido Autonomista Puerto-Riqueño* or Puerto Rican Autonomist Party.⁹⁶ Reacting to this surge in autonomist activity, the much-hated Governor Romualdo Palacio unleashed a round of persecution.⁹⁷ Taking advantage of his return to Madrid to plead Puerto Rico's case on the mainland, Degetau founded the newspaper *La Isla de Puerto Rico* that year, with the aim of exposing Palacio's abuses and seeking support for reforms that would address Puerto Rico's plight.⁹⁸ With this effort, which required long-distance collaboration with fellow activists and reformers on the island, Degetau began to establish himself as one of the leaders of Puerto Rico's autonomist movement.⁹⁹

94. See FRANCISCO A. SCARANO, PUERTO RICO: CINCO SIGLOS DE HISTORIA 420, 514–515 (1993).

95. See BURGOS MALAVÉ, *supra* note 19, at 22 n.59 (quoting the accusation that Cuban censors levied against the autonomist newspaper *El Triunfo*, which had published an article entitled “Nuestra Doctrina” or “Our Doctrine”). On the autonomist movement in Cuba, see also MARTA BIZCARRONDO & ANTONIO ELORZA, CUBA/ESPAÑA: EL DILEMA AUTONOMISTA, 1878-1898 (2001); MILDRED DE LA TORRE, EL AUTONOMISMO EN CUBA, 1878-1898 (1997); Antonio-Filiu Franco Pérez, *Cuba y el orden jurídico español del siglo XIX: La descentralización colonial como estrategia y táctica jurídico-política (1837-1898)*, 5 REVISTA ELECTRÓNICA DE HISTORIA CONSTITUCIONAL (June 2004), <http://hc.rediris.es/05/Numero05.html?id=16> (last visited Dec. 21, 2007); Antonio-Filiu Franco Pérez, *Vae Victis!, o la biografía política del autonomismo cubano (1878-1898)*, 3 REVISTA ELECTRÓNICA DE HISTORIA CONSTITUCIONAL (June 2002), <http://hc.rediris.es/03/Numero03.html?id=11> (last visited Dec. 21, 2007); see also ALVARADO, *supra* note 92.

96. See BURGOS MALAVÉ, *supra* note 19, at 22 & n.59 (Puerto Rican court); D'ALZINA GUILLERMET, *supra* note 19, at 131 (formation of party).

97. See BURGOS MALAVÉ, *supra* note 19, at 27–30; D'ALZINA GUILLERMET, *supra* note 19, at 132; SCARANO, *supra* note 94, at 522–23. The Degetau Papers contain several letters concerning these events.

98. See, e.g., Letter from Francisco Cepeda to Degetau (Nov. 26, 1887), in Degetau Papers, *supra* note *, 1/III/16 (thanking Degetau for his newspaper's defense of “innocence violated” by Palacio) (original in Spanish); Letter from [Illegible] to Degetau (Nov. 28, 1887), in *id.*, 1/III/17 (congratulating him on founding the newspaper) (original in Spanish); Letter from B. Tió Segarra to Degetau (Dec. 8, 1887), in *id.*, 1/III/19 (telling Degetau that the newspaper had been well received); Letter from Facundo de la Peña to Degetau (Dec. 9, 1887), in *id.*, 1/III/22 (congratulating him on founding the newspaper and reporting on island politics); see also undated and unidentified news clipping, in *id.*, 1/III/18 (announcing the foundation of *La Isla de Puerto Rico*, “defender of the interests of this Province”).

99. See, e.g., Letter from Manuel Fernández Juncos to Degetau (Dec. 8, 1887), in *id.*, 1/III/20.

Spain's successive nineteenth century constitutions had repeatedly promised that "special laws" would be enacted for Spain's colonies (Puerto Rico, Cuba, and the Philippines), yet no special laws had been forthcoming (and none would be, until the eve of the war in 1898).¹⁰⁰ The autonomists made it their mission to persuade the Spanish government to enact the special laws to confer autonomy on its colonies. They lobbied for a system that would replace their oppressive and outmoded colonial regime with an autonomous arrangement inspired by liberal political and economic ideas (e.g., constitutionalism, rights, free trade), and in which creoles would exercise their fair share of power. They also often cited the autonomy granted Canada under British imperial law as an example of a more desirable regime.¹⁰¹ Once formed, the Puerto Rican Autonomist Party worked with increasing intensity to obtain these reforms from Spain, alongside the autonomists of neighboring Cuba, who had formed a party of their own.¹⁰² But in Cuba, a stronger pro-independence sentiment existed, and separatism eventually overtook the autonomist movement. Fighting broke out between Cuban separatists and Spain three times in the last decades of the nineteenth century: this

Fernández Juncos, the founder and editor of the autonomist newspaper *El Buscapié*, was yet another leading figure in Puerto Rican politics and society; he wrote Degetau to let him know he had received copies of the newspaper and would begin to circulate them. The Degetau Papers contain numerous letters to Degetau in Madrid from colleagues and friends in Puerto Rico.

100. See CONSTITUCIÓN DE LA MONARQUÍA ESPAÑOLA DE 18 DE JUNIO DE 1837, Additional Articles, art. 2 ("The Overseas provinces will be governed by special laws.") (original in Spanish); CONSTITUCIÓN DE 23 DE MAYO DE 1845, Additional Article, art. 80 (original in Spanish) (same); CONSTITUCIÓN DE LA MONARQUÍA ESPAÑOLA DE 1856, tit. XIV, art. 86 (original in Spanish) (same); CONSTITUCIÓN DE LA NACIÓN ESPAÑOLA VOTADA DEFINITIVAMENTE EN LA SESIÓN DEL DÍA 1 DE JUNIO DE 1869, tit. X, art. 108 (original in Spanish) (stating that the Spanish Cortes would "reform the current system of government of the overseas provinces, as soon as the delegates from Cuba or Puerto Rico have taken their seats, to extend to the same, with the modifications deemed necessary, the rights guaranteed in the Constitution"); LEY SANCIONADA POR S. M. Y PUBLICADA EN EL CONGRESO, RELATIVA A LA CONSTITUCIÓN DE LA MONARQUÍA ESPAÑOLA DE 1876, tit. XIII, art. 89 (original in Spanish) ("The overseas provinces will be governed by special laws; but the Government is authorized to apply, with the modifications it judges convenient and after notifying the Cortes, the same laws promulgated or to be promulgated for the Peninsula."); see also Josep M. Fradera, *Why Were Spain's Special Overseas Laws Never Enacted?*, in SPAIN, EUROPE AND THE ATLANTIC WORLD: ESSAYS IN HONOR OF JOHN H. ELLIOTT 334 (Richard L. Kagan & Geoffrey Parker eds., 1995).

101. See BURGOS MALAVÉ, *supra* note 19, at 37 (quoting JOSÉ A. GAUTIER DAPENA, BALDORIOTY, APÓSTOL 96 (1970)); D'ALZINA GUILLERMET, *supra* note 19, at 121; see also J.C.M. Oglesby, *The Cuban Autonomist Movement's Perception of Canada, 1865-1898: Its Implication*, 48 AMERICAS 445 (1992). Although Oglesby's article focuses on Cuba, the Canadian model exercised a similar influence in Puerto Rico.

102. On the autonomist movement in Cuba, see sources cited *supra* note 95.

on-again, off-again war for independence raged in 1868-1878, 1879-1880, and 1895-1898.¹⁰³

Meanwhile, Puerto Rican autonomists began to distance themselves from their Cuban counterparts, whose increasing embrace of separatism strengthened Spain's resolve against granting any reforms at all to either colony. In early 1897, as it became increasingly evident that Spain might not be able to defeat the Cuban separatists, the Puerto Rican Autonomist Party selected a group of five commissioners to make the case for Puerto Rican autonomy in Madrid.¹⁰⁴ The Commission included Rafael María Labra, a native of Cuba who lived in Spain and had served for decades as a representative in the Spanish parliament, or *Cortes*, from which position he had vigorously defended autonomy for the colonies; and four Puerto Ricans: José Gómez Brioso, a medical doctor and the President and Political Director of the Autonomist Party; Rosendo Matienzo Cintrón, a lawyer who had previously served as Secretary of the Autonomist Party; Luis Muñoz Rivera, a journalist, poet, writer, and politician; and Degetau.¹⁰⁵

The autonomist Commissioners emphasized Puerto Rico's loyalty to Spain (in contrast to Cuba's treasonous separatism), and tried to persuade the Spanish government that it should reward the island for this loyalty by granting it the reforms it had so patiently awaited.¹⁰⁶ But it was the intensified fighting in Cuba (and the growing threat of U.S. intervention), rather than the relative quiet in Puerto Rico, that finally prompted the Spanish government to relent and enact the long overdue reforms. Convinced that only drastic measures could forestall Cuban independence—and aware that there was growing pressure in the United

103. See generally ADA FERRER, *INSURGENT CUBA: RACE, NATION, AND REVOLUTION, 1868-1898* (1999); EMILIO ROIG DE LEUSCHENRING, *LA GUERRA LIBERTADORA CUBANA DE LOS TREINTA AÑOS, 1868-1898: RAZÓN DE SU VICTORIA* (Oficina del Historiador de la Ciudad de La Habana, 2d ed. 1958). The final stage of fighting culminated in the U.S. intervention in 1898, which helped lead to Spain's defeat.

104. See generally *HISTORIA DEL PACTO SAGASTINO A TRAVÉS DE UN EPISTOLARIO INÉDITO* (Pilar Barbosa ed., 1981).

105. See *id.* at xi–xiv.

106. The story of the Commission's trip, including the arguments they made to political figures in Madrid, is chronicled in detail in Barbosa, *supra* note 104, a compilation of letters written primarily by José Gómez Brioso but also by other Commissioners, and in Luis Muñoz Rivera, *Apuntes para un Libro (1896-1900)*, in *3 CAMPAÑAS POLÍTICAS* (Luis Muñoz Marín ed., 1925), a memoir edited by Luis Muñoz Rivera's son, Luis Muñoz Marín, who later became a four-term governor of Puerto Rico. Although the title of the Barbosa compilation describes it as "unedited," the archive has been lost, so the accuracy of the letters is impossible to verify. Meanwhile, Muñoz Rivera's memoir triggered a certain amount of controversy when some of the other actors involved challenged his recollection of the events. I discuss these events and the controversy surrounding them in *Autonomy Within Empire*, *supra* note 16.

States to intervene in the Cuban war—the Spanish government finally granted Cuba and Puerto Rico each a “Charter of Autonomy” in late 1897.¹⁰⁷ These Charters, in effect local constitutions, reorganized the governments of the islands along autonomist lines: in Puerto Rico’s case, the Charter granted even greater powers than the autonomists had sought.¹⁰⁸ But it was too little, too late: Puerto Rico’s local legislature, a body created under the Charter, opened its sessions on July 17, 1898, and closed them abruptly less than a week later as U.S. troops landed in the town of Guánica, Puerto Rico. The troops encountered virtually no resistance on the island and later that summer, Spain surrendered to the United States.¹⁰⁹

Most Puerto Rican autonomists were sanguine, at first, about the island’s annexation to the United States. They believed that it would eventually lead to statehood in the Union, and in this way would ensure for Puerto Rico the autonomy it had awaited so long and enjoyed so fleetingly.¹¹⁰ Even before the transfer of sovereignty was completed by

107. See BURGOS MALAVÉ, *supra* note 19, at xi; D’ALZINA GUILLERMET, *supra* note 19, at 192–208; DE LA TORRE, *supra* note 95, at 166–70. De la Torre’s book is a strikingly tendentious work in an already contentious field; for instance, she describes the autonomists as “traitors” to the Cuban nation, see DE LA TORRE, *supra* note 95, at 170, and titles one of her chapters “*La autonomía contra la nación cubana*” or “Autonomy versus the Cuban Nation,” *id.* at 173. (In doing so, de la Torre, who lives in Cuba, toes the official party line in Cuba on the autonomist movement.) Nevertheless, her book is probably the most thorough study of the late nineteenth century Cuban autonomist movement that has been produced in Cuba.

108. Compare the Autonomist Party’s platform (the “Plan de Ponce,” named for the city in which it was adopted in 1886), reproduced (in photographic form and by transcription) in PLAN DE PONCE PARA LA REORGANIZACIÓN DEL PARTIDO LIBERAL DE LA PROVINCIA Y ACTA DE LA ASAMBLEA CONSTITUYENTE DEL PARTIDO AUTONOMISTA PUERTORRIQUEÑO (1991), with the Charter of Autonomy, reprinted in the Appendix to Hernández Cruz, ed., *supra* note 19, at 91. Although there were two major strands of *autonomismo* in Puerto Rico, and they disagreed vigorously on plenty of issues, both camps claimed to be supporters of the “Plan de Ponce.”

109. See BURGOS MALAVÉ, *supra* note 19, at 298. But cf. SCARANO, *supra* note 94, at 549, 556–59 (describing how Puerto Ricans at first reacted to the imminent invasion with expressions of loyalty to Spain; how, after the invasion occurred, most of them received the United States with open arms; and how, not long thereafter, disappointment with the United States began to set in).

110. In a post-Civil War world, it would be fair to ask why the autonomists believed statehood would give Puerto Rico real “autonomy.” I address this question in a work-in-progress on the Puerto Rican autonomist movement in the nineteenth and early twentieth centuries. See Burnett, *Autonomy Within Empire*, *supra* note 16. For present purposes, suffice it to say that statehood would have brought Puerto Rico a great deal more autonomy than the island enjoyed under Spain throughout most of the nineteenth century. At any rate, there is no question that the leading Puerto Rican autonomists responded to the transfer of sovereignty by publicly endorsing statehood in the Union, see *supra* note 20, and this is all I am claiming here: even if one wonders why they endorsed statehood, the fact remains that they did. (Indeed, the fact that they did may suggest that the question is inspired more by a post-New Deal understanding of statehood than by a post-Civil War one.)

the exchange of ratifications, Puerto Rican autonomists had formed two new political parties, the *Partido Republicano* and the *Partido Federal*, each of which adopted a platform supporting statehood.¹¹¹ Degetau, who shared their optimism, joined the Republican Party; he also became the Secretary of Interior in the first cabinet formed under the U.S. military government.¹¹² But to the dismay of the autonomists, the island's annexation by the United States simply perpetuated the experience of second-class citizenship. Not only did it quickly become evident that Puerto Rico would not become a state of the Union anytime soon (if ever), but the debate in Congress over what to do about Puerto Rico culminated in the Foraker Act, which by denying U.S. citizenship to Puerto Ricans relegated them to a status subordinate even to that of the inhabitants of other U.S. territories.¹¹³

This was the state of affairs when Degetau became Puerto Rico's Resident Commissioner in 1900. From this position he renewed the struggle for equal citizenship, now under the new sovereignty. This meant not only finding opportunities to plead the cause of U.S. citizenship for Puerto Ricans, but also handling the letters from constituents, friends, and strangers who wrote to ask for help in dealing with the day-to-day obstacles posed by their uncertain citizenship status. In one of these letters, Rosendo Rodríguez of New York requested assistance on behalf of a friend whose mother had been detained on Ellis Island after arriving on a steamship from Puerto Rico in September 1903. The woman's daughter had gone to what Rodríguez referred to as "the Island of Emigrants" to seek her mother's release, but immigration officials had turned her away:

They rebuffed her, questioning whether she had the means to support her mother, and when she showed them my card, which guaranteed my support, they became agitated, saying that her mother was too old to be in this country, since she is over fifty years old....¹¹⁴

111. See PAGÁN, *supra* note 20, at 35–36 (*Partido Republicano*), 49–50 (*Partido Federal*).

112. See MERGAL LLERA, *supra* note 17, at 165.

113. On citizenship in the earlier territories, see BREAKTHROUGH, *supra* note 80.

114. Letter from Rosendo Rodríguez to Degetau (Sept. 15, 1903), in Degetau Papers, *supra* note *, 4/V/286, at 1–3 (original in Spanish). Rodríguez's reference to Ellis Island as "the Island of Emigrants" (as opposed to "immigrants") helpfully brings to the fore a distinctively peripheral perspective on the history of migration and citizenship. For work that reconceptualizes citizenship with the phenomenon of emigration in mind, see Kim Barry, *Home and Away: The Construction of Citizenship in an Emigration Context*, 81 N.Y.U. L. REV. 11 (2006), and the symposium inspired by Barry's work, *id.* at 1–293.

A telegram that follows this letter in Degetau's papers reveals that he undertook to help secure the release of the woman. In the telegram, he informs Rodríguez that "further evidence" would be admitted on the woman's behalf, and instructs him to go to Ellis Island "tomorrow Wednesday at two o'clock." The telegram is undated, but it was probably written in December of 1903, which indicates that the mother's case remained unresolved for at least three months.¹¹⁵

Another constituent wrote seeking Degetau's aid in securing his son's return to Puerto Rico from the Mexican state of Mérida, appealing to the principle that "the protection of the American flag extended to every Puerto Rican abroad."¹¹⁶ Still another, Pascual López, wrote from Buffalo, describing a different predicament:

I have not been permitted to take the Civil Service or Government exams because they say I am not an American, and since I cannot offer any documentation on my naturalization, and they say we cannot yet be considered Americans, I have had to give up on that idea.¹¹⁷

Such were the obstacles and indignities the new colonial subjects of the United States faced as a result of their unresolved status.

Scholars have placed much emphasis on the denial of constitutional rights (such as the right to a trial by jury) to the inhabitants of the unincorporated territories of the United States.¹¹⁸ But this emphasis on the extraterritorial applicability of constitutional rights is the product of a methodological preoccupation with the text of the Constitution, which while certainly a valid scholarly concern, can also divert attention from much of what was at stake, on the ground, for the people affected by these legal developments. As one discovers by spending some time with archival materials, the harm done by the ambiguous status imposed upon Puerto Ricans and Filipinos encompassed more than constitutional rights: their status placed them in an uncertain position with respect to a wide range of rights and privileges arising out of statutes, regulations,

115. Letter from Degetau to Rodríguez (Dec. 15, 1903), in *Degetau Papers*, *supra* note *, 4/V/308. Within weeks of the two o'clock appointment, the *Gonzales* decision would establish that immigration officials had lacked the authority to detain the woman.

116. Letter from [Illegible: Loren?] Rosario to Degetau (Feb. 6, 1902), in *id.*, 3/V/15, at 1–2 (original in Spanish).

117. Letter from Pascual Lopez to Degetau (Oct. 12, 1903), in *id.*, 4/V/319 (original in Spanish). López appears to have been an acquaintance of Degetau's as well: he also asked him for a recommendation.

118. Nearly every discussion of the *Insular Cases* focuses on the right to a trial by jury. For a more detailed critique of this scholarship, see Burnett, *supra* note 14, at 848–52.

and other rules, leaving their fate to be decided on a case-by-case basis. Because existing laws did not take into account persons who were neither citizens nor aliens, they regularly found themselves at the mercy of government officials with virtually unlimited discretion.¹¹⁹

An incident involving a family by the name of Abril and the Customs Collector of New York (also recorded in Degetau's papers) shows how the ambiguity surrounding the citizenship status of Puerto Ricans gave license to the authorities to make up the law as they went along; indeed, this situation involved an essentially arbitrary act of *inclusion*.¹²⁰ After traveling abroad, the Abril family returned to Puerto Rico via New York on October 23, 1903 on the steamer *La Lorraine*. The Collector of Customs of the Port of New York demanded payment of duties on certain articles they had purchased abroad. The Abril family protested, arguing that because they were not U.S. citizens, they were not subject to limits on the value of goods that they could bring back and did not have to pay any duties. But the Collector thought otherwise: he reasoned that because the family resided in Puerto Rico, it was domiciled in the "United States" and therefore subject to the payment of duties. One can readily imagine the frustration of the Abril family in light of the then-recently decided *Insular Cases* of 1901, which (as noted above) had held that goods entering the United States from Puerto Rico were subject to duties on the ground that Puerto Rico was *not* a part of the United States.¹²¹

119. One of the letters in Degetau's papers illustrates the point: José Celso Barbosa, a medical doctor, a fellow autonomist leader who had also joined the *Partido Republicano*, and a close friend of Degetau's, wrote to him in January 1902—six months after the *Insular Cases* had supposedly held that the Constitution did not "follow the flag" to Puerto Rico—to complain that the problem with individual rights in Puerto Rico arose *not* from the inapplicability of the federal Constitution, but from local law: "You know that it is frequently asserted that the U.S. Constitution rules in Puerto Rico in everything having to do with individual rights, but in practice this does not happen. Example: the right of association has been destroyed by the law on association[,] which imposes so many requirements for the enjoyment of this right...." Letter from Barbosa to Degetau (Jan. 28, 1902), in Degetau Papers, *supra* note *, 3/V/9. It would come as a surprise to scholars of this period, who have made so much of the proposition that the Constitution did not follow the flag to Puerto Rico, to discover that a Puerto Rican who was following developments as closely as Barbosa was thought that "the U.S. Constitution rules in Puerto Rico in everything having to do with individual rights."

120. It is unclear from the relevant documents whether the family was related to Mariano Abril, a well known journalist and political activist in Puerto Rico. The documents refer to a J. O. Abril. See Letter from Robert B. Armstrong to The Collector of Customs, New York, N.Y. (Nov. 23, 1903), in *id.*, 4/VI/373; Letter from Armstrong to Degetau (Dec. 9, 1903), in *id.*, 4/VII/9; Letter from Armstrong to Collector (Dec. 9, 1903), in *id.*, 4/VII/11.

121. See *supra* notes 28–29 and accompanying text.

The Abrils procured a lawyer, who wrote to the Department of the Treasury to convey their complaint (which encompassed not only the duties they had been forced to pay, but a certain "discourtesy" to which they had been subjected during what had been an unpleasant encounter with the Collector, who had apparently decided not only to interpret the law contrary to Supreme Court precedent, but also to be rude about it). After noting, with respect to the discourtesy, that "it appears that...the matter has been explained to them satisfactorily and that they do not desire any further explanation of the subject," Assistant Secretary of the Treasury Robert B. Armstrong sided with the Collector of Customs in the dispute over the duties: "Porto Rico...is part of the United States, at least territorially," Armstrong declared, sweeping aside with the stroke of a pen an issue so complicated that the Supreme Court had produced hundreds of pages in an effort to settle it—reaching, for constitutional purposes, a conclusion opposite to Armstrong's. As for whether the Abrils were U.S. citizens, it was "immaterial," for they were "undoubtedly residents of Porto Rico, and Porto Rico being a part of the United States they are necessarily residents of the United States."¹²² Or at least it seemed as if Puerto Ricans would be considered residents of the United States if and when it suited the government.

While he handled the appeals for assistance from his constituents, Degetau pursued his own efforts to clarify the citizenship status of Puerto Ricans. After reading a report by the Bureau of Insular Affairs that described the citizenship status of Puerto Ricans as "in suspense," Degetau wrote to the Chief of the Bureau to argue that this was a "mistake" because Puerto Ricans were "American citizens."¹²³ After the government began issuing Puerto Ricans travel documents in *lieu* of passports, Degetau applied for a regular passport, in an effort to force the issue.¹²⁴ He also applied for admission to the Supreme Court Bar, on

122. Letter from Armstrong to Collector (Dec. 9, 1903), in Degetau Papers, *supra* note *, 4/VII/11.

123. Letter from Degetau to Clarence R. Edwards (June 20, 1903), in *id.*, 4/III/222.

124. See Letter from Henry Randall Webb to Degetau (Aug. 14, 1901), in *id.*, 3/III/61 (offering his opinion on whether a court would issue a writ of mandamus ordering the Secretary of State to issue a passport "such as you consider that you are entitled to"); Letter from Webb to Degetau (Nov. 15, 1901), in *id.*, 3/III/99 (informing Degetau that "Coudert Bros, who were the lawyers who argued the De Lima and Downes cases in the U.S. Supreme Court[,] are anxious to take up your case with me and make a test case of it. They seem to think that you would be successful and that you should have a passport issued to you in the style you desire"). In 1900, the State Department had begun issuing Puerto Ricans certificates stating that they were entitled to the protection of the United States and in 1901, in response to several Filipino applications for passports, the State Department directed U.S. embassies to issue passports to Filipinos "as residents of the Philippine Islands and as such entitled to the protection of the United States." *Status of the Filipi-*

the theory that were he to be admitted, it would help trigger a recognition that Puerto Ricans were American citizens (since U.S. citizenship was one of the requirements of admission), or at the very least keep the question of why they were not in the public eye.¹²⁵ But as Degetau soon discovered to his chagrin, this door opened all too easily. A worldly and well-educated lawyer—and by all appearances a white male—Degetau had no difficulty being admitted to the Supreme Court bar.¹²⁶ The Court simply admitted him, and nothing further came of it.¹²⁷ As Solicitor General Hoyt put it in his argument in *Gonzales*, it would be “in high degree improper and untrue to describe [Degetau] as an alien,” even though Degetau was also Puerto Rican (and Hoyt himself would lead the charge in arguing that Puerto Ricans *en masse* should be considered aliens).¹²⁸ Hoyt did not try to explain this apparent contradiction; for someone like Degetau, apparently, an exception could be carved out of the already exceptional status reserved for all those other “Porto Ricans,” people who in the imaginations of Washington officials and much of the U.S. public were somehow lacking in the unnamed attributes that made Degetau the kind of person who could be thought of as a citizen, at least for certain practical purposes.

In light of Degetau’s experience confronting the problems raised by the ambiguous—but unambiguously second-class—citizenship status to which Puerto Ricans had been subjected under Spanish and then under

nos, FORT WORTH REG., June 3, 1901, at 4; *Passports for Filipinos*, DALLAS MORNING NEWS, June 2, 1901, at 2. A federal statute soon authorized the issuance of passports to persons “owing allegiance, whether citizens or not,” to the United States. An Act To Amend Sections Four Thousand and Seventy-six, Four Thousand and Seventy-eight, and Four Thousand and Seventy-five of the Revised Statutes, 32 Stat. 386 (1902), *codified at* 22 U.S.C. § 212. Later, the Attorney General and the Department of State would reach conflicting opinions on whether inhabitants of the Panama Canal Zone owed allegiance and were entitled to the protection of the United States—which would entitle them to passports—with the former holding the affirmative and the latter the negative. See *Passports-Natives Residing in the Canal Zone*, 26 Op. Att’y Gen. 376 (1907); CATHERYN SECKLER-HUDSON, *STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES* 193 (1934). All of this is suggestive of the potential for statelessness created by the ambiguous citizenship status of the inhabitants of the new U.S. territories at the turn of the twentieth century. On this potential, see Kerber, *supra* note 8.

125. See Letter from Degetau to Alejandro Besosa (draft) (May 2, 1901), in Degetau Papers, *supra* note *, 3/1/3; Letter from Degetau to Manuel F. Rossy (draft) (May 3, 1901), in *id.*, 3/1/4 (both originals in Spanish).

126. Whether Degetau, a Hispanic male, would have been considered “white” by the standards of the time is a complicated question. On the contested issue of “whiteness” in the context of immigration and citizenship, see generally, for example, JACOBSON, *supra* note 3; IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTIONS OF RACE* (1996).

127. See Letter from Manuel F. Rossy to Degetau (May 12, 1903), in Degetau Papers, *supra* note *, 4/11/176.

128. Brief for the United States, *supra* note 68, at 41.

U.S. rule, it comes as no surprise that he did not use his *amicus* brief in the *Gonzales* case as an opportunity to extol the virtues of the indeterminacy and flexibility of citizenship, as Coudert and Hoyt had done. On the contrary, Degetau contended that González, and all Puerto Ricans, had become U.S. citizens pure and simple by the combined operation of international and domestic law. They had gained U.S. citizenship by virtue of Spain's transfer of sovereignty over Puerto Rico to the United States (which had automatically made them citizens of the new sovereign) and by virtue of domestic legislation, principally in the form of the Foraker Act, which had implicitly made them U.S. citizens by calling them "*citizens* of Porto Rico."¹²⁹ Thus, as Degetau saw it, the Court need only recognize the U.S. citizenship of Puerto Ricans as a *fait accompli*.

Degetau—a native Puerto Rican, a "citizen of Porto Rico," a veteran of the autonomist movement, and a representative of Puerto Ricans in Washington—brought to the *Gonzales* case a perspective that did not often find a voice in the debate over imperialism in the United States: that of the colonial periphery. From the very first page, his brief made clear that he would not merely reprise the arguments of counsel, but rather that he would bring to the Court's attention insights that it was unlikely to obtain from his colleagues.

On that first page, for instance, he noted that the decision to bar González from entry into New York followed on the heels of the issuance of a circular by the Treasury Department applying immigration laws to Puerto Ricans, and he pointed out that prior to the circular, "Porto Rican laborers coming to work in tobacco factories of the mainland [had] landed in New York without being subjected to the restrictions of the

129. Brief filed by Federico Degetau y González as Amicus Curiae Supporting Appellant, in *Gonzales* Record, *supra* note 2, at 6–7, 32, 34–36 [hereinafter Amicus Brief]. In fact, the consensus among international lawyers was that a transfer of sovereignty confers the *nationality* of the new sovereign on the inhabitants of the new territory (as Coudert argued), but Degetau argued that even in "international language," "nationality" referred to citizenship. *See id.* at 36. In many cases this was true, as writers on international law usually did not explicitly distinguish between the two. Additionally, Degetau was relying on the assumption that at least in the United States, there was no recognized distinction between citizenship and U.S. nationality, which there had not been until then. For international law sources discussing the effect of a change of sovereignty on the inhabitants of annexed territory, see, for example, GEORGE COGORDAN, *LA NATIONALITÉ AU POINT DE VUE DES RAPPORTS INTERNATIONAUX* 321–22 (2d ed. 1890); 3 P. PRADIER-FODÉRÉ, *TRAITÉ DE DROIT INTERNATIONAL PUBLIC* 722 (1887); 1 ALPHONSE RIVIER, *PRINCIPES DU DROIT DES GENS* 185, 263 (1896); JOHN WESTLAKE, *INTERNATIONAL LAW: PART I: PEACE* 69–74, 209–10 (2d ed. 1910); GEORGE GRAFTON WILSON & GEORGE FOX TUCKER, *INTERNATIONAL LAW* 123–26 (1901).

immigration laws.”¹³⁰ Moreover, before the incident involving González, the only instance of a Puerto Rican being barred from entering the United States of which Degetau was aware involved a Professor Gómez Stanley, who upon arriving from France had been briefly detained at Ellis Island. Responding to Degetau’s complaint about that incident, the State Department had stated that “[t]he error of holding him, even temporarily evidently arose from the lack of knowledge of some officers as to the status of Porto Ricans, there having been no judicial decision in [sic] the question.”¹³¹ With that, Degetau invited the Court to issue said judicial decision, settling once and for all the status of Puerto Ricans as U.S. citizens.¹³²

Yet Degetau’s own argument unmasked the greatest obstacle he faced: the prejudices that lay behind the denial of citizenship to Puerto Ricans—prejudices concerning their level of “civilization” and capacity for self-government, no doubt informed by contemporary ideas about race (central among them, the idea that nonwhites were both unprepared and ill-suited for self-government), which the Justices would prove unable or unwilling to overcome despite Degetau’s entreaties (and despite his example).¹³³

Degetau already had dedicated a great deal of time and effort to rectifying the ignorance and misinformation about Puerto Rico that he had encountered on the mainland. Indeed Degetau was an old hand at such campaigns: recall his newspaper *La Isla de Puerto Rico*, which he founded with the aim of educating Spaniards about Puerto Rico in order to dispel the notion that Puerto Rico must be governed via the heavy hand of Spain’s military governors.¹³⁴ Far from relieving him and other Puerto Ricans from the burden of making such pleas, the transfer of sovereignty to the United States had if anything heightened the need for this sort of long-distance educational program. Upon his arrival on the mainland, on his way to serve as Resident Commissioner in Washington, Degetau had been chagrined to discover all manner of misinformation and prejudice respecting Puerto Ricans. “I work to correct the ideas

130. Amicus Brief, *supra* note 129, at 1.

131. *Id.* at 2 (quoting a letter from the State Department to Degetau dated February 16, 1901). Gómez is usually a last name in Spanish, but the brief refers to Professor “Gomez Stanley.” Perhaps this was the man’s name, or perhaps Degetau simply decided to repeat the name as it appeared on the relevant official documents just as he adopted the misspelling of Puerto Rico as “Porto Rico” in his amicus brief.

132. *Id.* at 2, *passim*.

133. On nineteenth century ideas about “civilization,” see GERRIT W. GONG, *THE STANDARD OF “CIVILIZATION” IN INTERNATIONAL SOCIETY* (1984).

134. See *supra* text accompanying notes 98–99.

that people here have about our country," he wrote to José Celso Barbosa, his friend and fellow autonomist:

People here think we are in a semi-savage state, that we do not have even the slightest moral sense and that we do not know what a deliberative body is.... But I don't get worked up, don't get upset, and don't get angry over the errors of others. With a white glove and cold Anglo-Saxon blood I reason with them and defend my country. Besides, it isn't hostility, but error. On the contrary, they feel sympathy, but of the sort inspired by a lower and different being.¹³⁵

Other letters expressed similar concerns. Although people felt a certain sympathy for Puerto Rico, they also held many unfavorable views, and correcting them was an "arduous and difficult task," he wrote his friend Manuel F. Rossy, a fellow leader of the autonomist movement who, like Degetau, had helped found the Puerto Rican Republican Party after the transfer of sovereignty to the United States. But, he continued, "I perform this task with the loyalty and interest that the performance of a duty inspires, without letting myself be impressed by pusillanimous silliness, and without indulging in altercations in bad taste."¹³⁶

With a similar equanimity he tried to educate the Justices who formed the target audience of his *amicus* brief, offering in the span of four pages a crash course in Puerto Rico's relations with and status under Spain.¹³⁷ To be sure, Degetau emphasized the positive in this history. His aim in doing so was obviously to shame U.S. authorities into establishing a *more*, not *less*, enlightened colonial government in Puerto Rico. Thus he focused on the "constitutional periods" of Spanish history, as he put it: several short-lived periods in which a constitution had been in effect in Spain. During these periods, he noted, Spain had granted Puerto Rico the right to send representatives to the Spanish *Cortes*; had declared Puerto Rico and Spain's other colonies "*an essential and integral part of the Spanish Monarchy*"; had extended constitutional rights to Puerto Rico; and, in 1897 (as noted above) had granted Puerto Rico the Charter of Autonomy ("a translation of which," Degetau added helpfully, "has been published by the War Department").¹³⁸

135. Letter from Degetau to Barbosa (Dec. 1900 or Jan. 1901), *quoted in Spanish in* TORRES DELGADO, *supra* note 18, at 31.

136. Letter from Degetau to Rossy (Jan. 4, 1901), *quoted in Spanish in id.* at 33.

137. *Amicus* Brief, *supra* note 129, at 18–21.

138. *Id.* at 18–20 (emphasis in brief) (internal quotation marks omitted).

Degetau went on to list the ways in which, even after the change of sovereignty, Spain had been more inclusive toward Puerto Ricans than the United States:

[W]hile it was discussed here whether or not the Civil Service laws were applicable to citizens of Porto Rico (a question decided in the affirmative by the Civil Service Commission), Spain has not found any legal obstacle in appointing native Porto Ricans to her public offices, as in the case of Mr. Wals y Merino, now in her diplomatic service and in her embassy at Washington; while it was doubted whether or not the citizens of Porto Rico could enjoy the privilege of being admitted as cadets at West Point and Annapolis (a question decided also in the affirmative by Congress in its last session), Spain has not found any legal obstacle in having many native Porto Ricans appointed among the officers of her army, as in the case of the present military Governor of the Province of Granada, General Manuel Nario y Guillermet; while the right to vote is denied to Porto Ricans residing in Illinois and the Hawaiian Islands, and accorded to them in Baltimore, Md., in Spain there is no legal obstacle to elect them as Senators to the Spanish Senate, as in the case of Mr. Garcia Molinas, the Porto Rican native who is at present a Senator from the Province of Zamora[,] and in the more remarkable case of Mr. Enrique Gonzalez, another native Porto Rican recently elected Senator by the Province of Zaragoza, who was an inhabitant residing in Porto Rico on the eleventh day of April, 1899.¹³⁹

139. *Id.* at 21 (citations omitted). On the rights of aliens to vote under state law, see KEYSSAR, *supra* note 47. Keyssar is also a good example of how the unique status devised for Puerto Ricans has contributed to their invisibility. His otherwise thorough and comprehensive history of voting rights in the United States does not discuss the inability of nationals to vote in states that limited voting rights to citizens, nor does he include Puerto Rico or other U.S. territories in his concluding discussion of the remaining unresolved voting rights controversies, which he identifies as the denial of federal representation in the District of Columbia and felon disenfranchisement. One assumes that Keyssar does not include the twentieth century territories in his discussion because in his view, they are not “really” part of the United States, though by now four million disfranchised U.S. citizens reside there, and the United States continues to claim sovereignty over them. For the unsuccessful results of litigation seeking full federal voting rights for Puerto Rico, see *Igartua-De La Rosa v. United States*, 417 F.3d 145 (1st Cir. 2005); 229 F.3d 80 (1st Cir. 2000); 32 F.3d 8 (1st Cir. 1994); *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001). For a current debate on the constitutionality and desirability of a statutory grant of congressional representation for Puerto Rico, see Christina Duffy Burnett, *Two Puerto Rican Senators Stay Home*, 116 YALE L.J. POCKET PART 408 (2007); John C. Fortier, *The Constitution Is Clear: Only States Vote in Congress*, 116 YALE L.J. POCKET PART 403 (2007); Ezra Rosser, *Promises of Nonstate*

In short, Degetau's strategy consisted in part of demonstrating that the United States had already adopted inclusive policies, albeit in a haphazard manner, and in part of shaming the United States with the comparison to Spain, which had been portrayed, in the frenzy of publicity leading to the war in 1898, as a backward, oppressive, and despotic imperial ruler in need of displacement by a benevolent governor like the United States, and which now seemed to be outdoing the United States in the matter of enlightened rule. Both kinds of arguments implicitly refuted the notion that Puerto Ricans were "semi savages" unprepared to govern themselves.

But Degetau's most pointed attack on these prejudices appeared in a section of his brief in which he laid bare the role that such attitudes had played in the denial of citizenship, by subjecting to scrutiny yet another term that had turned out to have implications for membership in the polity, but which his counterparts Coudert and Hoyt had left unexamined: "natives." Relying on the language of Article IX of the Treaty of Paris, the other lawyers and the lower court had sparred over the question of whether the "native inhabitants" of Puerto Rico were U.S. citizens. But Degetau reminded the Court that the Foraker Act described the people of Puerto Rico as "citizens of Porto Rico," not "natives of Porto Rico." Therefore, he argued, the question was not whether a "native of Porto Rico" was a U.S. citizen, but rather whether "a *citizen* of Porto Rico is a citizen of the United States."¹⁴⁰ Evidently Degetau had concluded that it would be easier to answer the latter question in the affirmative—that the label "citizen" was somehow invested with a certain dignity that the term "native" lacked, and that it should be easier to make the imaginative leap from "citizens of Porto Rico" to "citizens of the United States."

Additionally, one senses that Degetau was trying to prevent old categories of discrimination under Spain from spilling over into the new context of U.S. sovereignty. For Degetau, a creole who had dedicated decades of his life to the Puerto Rican struggle against Spanish policies favoring peninsular-born Spaniards over creoles, it must have been disconcerting, to say the least, to see the issue of who was born in Puerto Rico and who was not raise its ugly head again under the new sovereignty. Clearly appalled at the prospect, Degetau insisted that the

Representatives, 117 YALE L.J. POCKET PART 118 (2007) (discussing relevance of nonstate delegates for Indian tribes); José R. Coleman Tió, *Six Puerto Rican Congressmen Go To Washington*, 116 YALE L.J. POCKET PART 1389 (2007); José R. Coleman Tió, *Democracy Not Statehood: The Case for Puerto Rican Congressmen*, 116 YALE L.J. POCKET PART 397 (2007).

140. Amicus Brief, *supra* note 129, at 7.

Foraker Act had rendered irrelevant the issue of who was a native-born Puerto Rican and who was not: the Act had made *all* the inhabitants of Puerto Rico who were subjects of Spain on April 11, 1899 (the date of the exchange of ratifications), whether natives of the island or natives of the Peninsula, “citizens of Porto Rico,” with the exception only of those who chose to preserve their allegiance to Spain. Any further discrimination between “natives” of the island and others, he pointedly asserted, was therefore “unwarranted.”¹⁴¹

Even if the Foraker Act’s label “citizens of Porto Rico” had somehow not supplanted the treaty’s label “native inhabitants of the territories,” but instead must coexist with it, the latter phrase had nevertheless been misread by the court below, argued Degetau—and here he ventured deeper into the sensitive topic of precisely what lay behind the treaty’s distinction between peninsular Spaniards and creoles, or as the treaty put it, “natives of the Peninsula” and “native inhabitants of the territories.”¹⁴²

As noted above, under the Treaty of Paris natives of the Peninsula had been given what under international law was known as the right of election: that is, according to Article IX, inhabitants of Puerto Rico born in Spain (who were described as “Spanish subjects”) had the right to retain their allegiance to Spain or to transfer it to the United States.¹⁴³ But the native inhabitants of the new territories had been denied this right, their “civil rights and political status” to be determined by Congress at some later date.¹⁴⁴ Surprisingly, the distinction between these two groups—a distinction based on birthplace—reproduced the age-old distinction between Spaniards and creoles; the distinction was then exacerbated by the decision to count only the former as “Spanish subjects,” and imported into U.S. law.¹⁴⁵

Intent upon preventing this familiar form of discrimination under Spain from becoming entrenched under the new sovereignty, Degetau argued that the language of the treaty could not be interpreted literally. The negotiators of the Treaty of Paris, he argued, had intended the phrase “native inhabitants of the territories” to refer *not* to all native-

141. *Id.* at 6–7.

142. Treaty of Paris, *supra* note 4, art. IX.

143. *Id.* The treaty gave natives of the Peninsula a choice between remaining Spanish subjects or acquiring the “nationality” of the new sovereign, but there is no evidence to suggest that the treaty negotiators anticipated the imminent bifurcation of nationality and citizenship (although they did contribute to it with Article IX).

144. *Id.*

145. For sources on the creole-peninsular distinction, see *supra* note 93.

born Puerto Ricans and Filipinos, but rather only to “uncivilized native tribes,” as he put it (quoting an earlier treaty, which he would cite as an example of what the negotiators had meant to do).¹⁴⁶ Such tribes, he hastened to add, could be found only in the Philippines.¹⁴⁷ As for Puerto Rico, Degetau went on, it should not be affected at all by the exclusion of “native inhabitants” from citizenship, because there were no “native Indians” there, and there had not been any for centuries.¹⁴⁸

In support of this argument, Degetau reviewed the records of the treaty negotiations at Paris in some detail. “Let us examine what was the real intention of the American Commissioners,” Degetau wrote, and he began by quoting a telegram dated November 29, 1898, from Secretary of State John Hay to the President of the Peace Commission charged with negotiating the Treaty of Paris:¹⁴⁹

President [William McKinley] wishes to know the opinion of the Commission as to inserting in treaty provisions on the subject of citizenship *of inhabitants of the Philippines which will prevent extension of that right to Mongolians and others not actually subjects of Spain*; also whether you consider it advisable to pro-

146. Amicus Brief, *supra* note 129, at 30. The earlier treaty was the treaty for the annexation of Alaska. See Alaska Treaty, *supra* note 81, art. III.

147. Amicus Brief, *supra* note 129, at 30.

148. *Id.* at 33. The history of the disappearance of the indigenous peoples of the Caribbean is a complicated and contested one. To be sure, Degetau’s assertion that there were no “native Indians” left in Puerto Rico was ideologically charged: he obviously offered it as part of his defense of the degree of “civilization” of Puerto Rico’s population. (Later in his brief, he would add that there were no more than “sixty” indigenous inhabitants left in Puerto Rico by 1543. See *infra* note 165 and accompanying text. In arriving at the number “sixty,” Degetau probably relied on José Julián Acosta’s annotations to Father Agustín Iñigo Abbad y Lasierra’s HISTORIA GEOGRÁFICA, CIVIL Y NATURAL DE LA ISLA DE SAN JUAN BAUTISTA DE PUERTO-RICO 141–42 (1866) (referring to the “sixty remaining Indians” in Puerto Rico in early 1544)). At the same time, scholars agree that the arrival of Europeans triggered the near extinction of Amerindians in the Caribbean. See SCARANO, *supra* note 94, at 149. Then again, sixteenth century Spanish colonizers did not count *mestizos*, those of mixed European and Amerindian descent, as indigenous. See *id.* at 148–51; see also Schwartz, *supra* note 93, at 10. A recent study, which has used mitochondrial DNA analysis to suggest that Puerto Rican women have many more Taíno ancestors than previously thought, raises questions about the reliability of the earlier ethnographic data. See Juan C. Martínez Cruzado et al., *Reconstructing the Population History of Puerto Rico by Means of mtDNA Phylogeographic Analysis*, 128 AM. J. PHYSICAL ANTHROPOLOGY 131 (2005). I am grateful to Francisco Scarano for offering guidance and sharing citations on this topic, and in particular for his suggestion that I look at Acosta’s annotations to Abbad’s HISTORIA.

149. As it happened, the President of the Commission was Justice Day, who had since been appointed to the Court and was sitting when it heard the *Gonzales* case—putting Degetau in the awkward position of arguing Day’s intent to Day himself. See SECRET PROCEEDINGS OF THE PEACE COMMISSION: OFFICIAL VERBATIM REPORT IN SPANISH AND ENGLISH OF EVERY SESSION AND THE PROTOCOLS AND TREATY IN FULL BETWEEN THE UNITED STATES AND SPAIN 4 (1899) [hereinafter SECRET PROCEEDINGS].

vide, if possible, for recognition of existence of *uncivilized native tribes in same manner as in Alaska treaty, perhaps leaving to Congress to deal with status of inhabitants by legislative act.*¹⁵⁰

Consistent with Degetau's argument, the telegram did express concern with the Philippines, not with Puerto Rico, and it referred to "uncivilized native tribes" in a manner that clearly did not embrace *all* of the native inhabitants of the territories. The earlier treaty to which the telegram referred, the 1868 treaty for the acquisition of Alaska from Russia, had offered the inhabitants of that territory *except* for its "uncivilized native tribes" the right of election (in that case, a choice between returning to Russia or remaining and becoming U.S. citizens). As for the "uncivilized native tribes" of Alaska, their status had been left up to Congress to handle.¹⁵¹ Thirty years later, the American Commissioners at Paris in 1898 heeded Hay's instruction, but they decided not to echo the language of the Treaty of Alaska (which would have involved simply distinguishing between "Spanish subjects" and "uncivilized native tribes"). That decision was where (from Degetau's perspective) the trouble had started.

Alluding to the protocols of the peace conference, Degetau argued that it was clear "that the classification of the inhabitants as *native of the Spanish Peninsula* and *native of the territories*...was made in answer to the suggestion of President McKinley [via Secretary of State Hay] in the quoted telegram."¹⁵² As Degetau interpreted these events, the American Commissioners had merely intended to ensure that U.S. citizenship would not extend to "Mongolians and others not actually subjects of Spain" or to "uncivilized native tribes" in the Philippines, as Hay's telegram instructed, but the treaty language had drawn the line in the wrong place.¹⁵³

The protocols support Degetau's argument. The peace conference took up the question of nationality at the sessions of December 6, 8, and 10, 1898.¹⁵⁴ The U.S. Commissioners' original proposal for the language of Article IX did not in fact distinguish between natives of the Peninsula and natives of the territories:

150. Amicus Brief, *supra* note 129, at 27–28 (emphasis in brief) (quoting telegram). By "Mongolians" in the Philippines, the telegram presumably meant the Chinese population of the islands. I am grateful to Alfred McCoy for pointing this out.

151. *Id.* at 28 (quoting Alaska Treaty, *supra* note 81, art. III).

152. Amicus Brief, *supra* note 129, at 28 (emphasis added).

153. *Id.* at 29.

154. SECRET PROCEEDINGS, *supra* note 149, at 194–95, 208–12.

*Spanish subjects residing in the territory over which Spain...relinquishes or cedes her sovereignty...may preserve their allegiance to the Crown of Spain.... Except as provided in this treaty, the civil rights and political status of the inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.*¹⁵⁵

This language left unresolved the status of those who did not choose to preserve their allegiance to Spain, but it offered that choice to all “Spanish subjects residing in the territory” without limiting that group to those born on the Peninsula.

The Spanish Commissioners offered a counter-proposal with language that on its face would have conferred the right of election upon *all* the inhabitants of the islands, without exception—not only all Spanish subjects, whether native of the island or of the Peninsula, but also all foreigners, and presumably all “uncivilized tribes” as well.¹⁵⁶ The American Commissioners balked and offered yet another counter-proposal, using the language that would become final: they further narrowed the category of those who would enjoy the right of election by distinguishing between “Spanish subjects, natives of the Peninsula” and “native inhabitants of the territories,” and conferred the right of election only upon the former.¹⁵⁷

Objecting to this new counter-proposal, the Spanish Commissioners complained that “[t]he American Commission refuses to acknowledge the right of the inhabitants of the countries ceded or relinquished by Spain to choose the citizenship with which up to the present moment they have been clothed,” an allusion to the right of election under international law.¹⁵⁸ But the American Commissioners apparently misunderstood the objection: they defended their new proposal by insisting that they had not withheld the right of election, but rather that they had offered it to all “Spanish subjects”—defined by the Americans as those

155. *Id.* at 194 (emphasis added).

156. *Id.* at 194.

157. *Id.* at 195. This counter-proposal, embodied in the final language of the treaty, did not mention foreigners at all. It is not clear from the language of the treaty what was supposed to happen to them, though what actually happened was that they came to be considered eligible to apply for U.S. citizenship. See José A. Cabranes, *Judging, in Puerto Rico and Elsewhere*, 31 FROM THE BAR 13 (2001) (describing petitions for citizenship in the U.S. District Court for the District of Puerto Rico during the early years of its operation, including many petitions submitted by foreigners in Puerto Rico). As for “uncivilized native tribes,” they would of course be subsumed under the category of native inhabitants.

158. SECRET PROCEEDINGS, *supra* note 149, at 208 (memorandum setting forth objections in Spanish at 208–09 and in English at 209–10). I offer my own translation of the Spanish version.

born on the Peninsula. Their response of course missed the Spanish Commissioners' point that the native inhabitants of the territories were *also* Spanish subjects, and that they too should have the right to choose whether to retain their former citizenship or to adopt that of the United States.¹⁵⁹ But the American Commissioners in turn complained that the Spanish proposal went too far, because it would allow too many inhabitants to choose a nationality "other than the one in control of the territory," while at the same time permitting them to enjoy the benefits of "local sovereignty," a situation that the American Commissioners argued would have been "anomalous."¹⁶⁰

On the "anomalous" nature of that situation, they were mistaken (or disingenuous). According to standard international practice, an annexing sovereign could require the inhabitants of annexed territory to vote with their feet, so to speak: those who elected to retain the citizenship of the displaced sovereign could be required to leave the annexed territory (as had been done in the case of Alaska, where Russian subjects had been given the choice to become U.S. citizens or remove to Russian territory).¹⁶¹ In the cases of Puerto Rico and the Philippines, if the United States had required those inhabitants who chose to remain Spanish subjects to exercise their choice by returning to Spain, this would have obviated the concern that too many foreign subjects would remain in U.S. territory.

However, the U.S. Commissioners prevailed, despite their insistence on an arrangement that did not respect the right of election and, in this sense, defied the consensus among writers on international law: the distinction between "natives of the Peninsula" and "native inhabitants of the territories" became part of the final Article IX, with only the former enjoying the right of election. As a result, the American Commissioners succeeded in excluding not only "uncivilized native tribes" from the right of election, as Hay had instructed them to do, but *all* native-born Puerto Ricans and Filipinos.

159. Again, the Spanish Commissioners' proposal went even further: by its terms, it included foreigners as well, who would have had the right to retain their own former nationality or to acquire U.S. citizenship.

160. SECRET PROCEEDINGS, *supra* note 149, at 212.

161. Alaska Treaty, *supra* note 81, art. III; see WESTLAKE, *supra* note 129, at 71 ("[T]he established practice has long been to fix a time within which individuals may, formally or practically, opt for retaining their old nationality, on condition of removing their residence from the ceded territory."). As Westlake notes, one exception to this rule involved the U.S. annexation of Mexican lands in 1848: the inhabitants of annexed Mexican territory who chose to retain their Mexican citizenship were allowed to remain in the annexed territory. See *id.* at 71 n.2; Treaty of Guadalupe Hidalgo, *supra* note 81, art. VIII.

As Degetau read the record, the Commissioners had implemented Hay's instruction to exclude "uncivilized native tribes" (to which Degetau did not object) by inadvertently sweeping all native-born Puerto Ricans into the same category as "uncivilized native tribes" (which Degetau found unacceptable). As a result, Degetau now found himself arguing, against the text of the treaty, that the Commissioners could not have intended to treat native-born Puerto Ricans (such as himself) in the same manner as the "Mongolians" and "uncivilized tribes" of the Philippines: defying its plain language, he wrote that

the words "native inhabitants" employed by the treaty were intended to describe "all the uncivilized tribes which have not come under the jurisdiction of Spain," and to distinguish them from the inhabitants of the countries ceded which up to the date of the stipulation of the treaty were clothed with Spanish citizenship.¹⁶²

Pressing the issue, Degetau turned to the case of one Mr. García Molinas, an artist and native of Puerto Rico, who had been living in Paris on April 11, 1899 (the date of the exchange of treaty ratifications).¹⁶³ García Molinas had encountered a problem trying to bring his works back with him to Puerto Rico, because his status was unclear due to his absence from the island on the date of ratification (in other words, the question was whether he was a native "*inhabitant*" of Puerto Rico for purposes of the Treaty of Paris if he did not reside there on April 11, 1899). In an opinion concerning the García Molinas case, the Attorney General had concluded that a "native Porto Rican, an artist by profession, although temporarily living in France...is under [the Foraker Act] a citizen of Porto Rico and as such is an American artist." The Attorney General had gone on to illustrate the point by declaring that an "American tribal Indian, or a native Alaskan, for example, who should become an artist and go abroad might naturally be considered an American artist within the intent of the statute."¹⁶⁴ Honing in on this last statement—with its implication that Puerto Ricans belonged in the same category as tribal Indians and native Alaskans—Degetau complained that the analogy was "confusing to me when applied to Porto Rico." Elaborating

162. Amicus Brief, *supra* note 129, at 30.

163. I do not know whether this García Molinas is the same García Molinas mentioned in the quote accompanying note 139.

164. Amicus Brief, *supra* note 129, at 32 (quoting 24 Op. Att'y Gen. 40 (1902)). The Court would find this example persuasive, and use it in the *Gonzales* opinion. See *Gonzales v. Williams*, 192 U.S. 1, 14–15 (1904) (referring to "Mr. Molinas" instead of "Mr. García Molinas").

sarcastically, he added, "I will not deny the possibility of the tribal Indians or members of the uncivilized tribes of Alaska going abroad to study fine arts and becoming painters. All is in the hands of the Almighty." However, such a possibility had nothing to do with Puerto Rico, where "there are not native Indians at present. Already in 1543 there remained only sixty native Indians in the whole Island."¹⁶⁵ Degetau's point was clear: natives of Puerto Rico were not *that* kind of native.

Degetau's argument on the meaning of the phrase "native inhabitants of the territories" was a model of tactful diplomacy. He did not directly accuse the American Commissioners or the Attorney General of harboring unjustified prejudices against the inhabitants of the territories. (Indeed, as far as "uncivilized" natives were concerned, Degetau evidently shared their implicit views.) With respect to the Commissioners, he merely suggested that they must have selected the language of Article IX inadvertently; as for the Attorney General, Degetau offered the subdued criticism that the analogy between Puerto Ricans, tribal Indians, and native Alaskans was "confusing" (along with a sarcastic dismissal of the notion that tribal Indians or Alaskans might become fine artists). Yet behind the self-restraint there loomed a serious concern: that the age-old Spanish distinction between creoles and peninsulars had been replicated under the new sovereignty.

Degetau had reason to be concerned. Remarkably, Spain had indeed managed to perpetuate the caste system that had long plagued its own relations with its last remaining colonies, bequeathing the creole/peninsular distinction virtually intact to its successor-in-empire, the United States, even as it lost its grip over these colonies.¹⁶⁶ The American adoption of this geographically-based discrimination (by way of a distinction between "natives of the Peninsula" and "native inhabitants of the territories") meant that Puerto Ricans would now be lumped into the same category as other racial and ethnic minorities in the United States, who in the past (and in some cases, the present) had been denied either citizenship, or its rights, or both. The assumption that Puerto Ricans somehow belonged with tribal Indians and native Alaskans on the spectrum of political membership—that is, that they were not fit, racially, ethnically, or with respect to their level of "civilization," to be full-

165. Amicus Brief, *supra* note 129, at 33. On Degetau's sources and on the disappearance of the indigenous population of Puerto Rico generally, see *supra* note 148.

166. As we have seen, the Spanish negotiators actually objected to the insertion of this distinction in the Treaty of Paris. However, as Degetau could have attested, the recognition by Spain of equality between creoles and peninsulars was a phenomenon of very recent vintage.

fledged Americans—had driven the decision to exclude them. As he struggled against this dismaying turn of events, Degetau tacitly put himself forward as evidence to the contrary. A perfectly “civilized” person by any standard the American Commissioners could possibly have had in mind, Degetau sought to lay to rest, by word and by deed—and by his mere existence—all doubts as to whether Puerto Ricans were worthy of U.S. citizenship.

But the Court, like the political branches, would opt to follow the one Spanish example that Degetau had worked so hard to cast in a negative light, by giving sanction to the geographically-based discrimination that distinguished native-born Puerto Ricans from peninsular Spaniards. Re-incarnated under the new sovereignty, this discrimination lived on to distinguish native-born Puerto Ricans from other Americans. Neither Degetau’s words, nor his deeds, nor even his existence would be enough to overcome the prejudices that led to this outcome, or to convince the Court that Puerto Ricans as a group, not to mention Filipinos, should be considered U.S. citizens just yet. Instead, the view that prevailed was that of the Attorney General in the *García Molinas* case, who had written that “[i]t is clearly not inconceivable for a man to be an American artist within the meaning of such a statute and yet not be a citizen of the United States.”¹⁶⁷ For Degetau, it *was* inconceivable: as he put it, “This statement is most perplexing for me. I cannot conceive how...an American can be at the same time not a citizen of the United States.”¹⁶⁸ But he would soon find out.

III. “PUERTO RICANS ARE NOW AMERICANS...”

“Puerto Ricans are now Americans,” reported the *Dallas Morning News* after the *Gonzales* decision came down.¹⁶⁹ So the Court had declared, although another editorial on the case captured the curious result somewhat more accurately: “Puerto Ricans are not Aliens—Quaere: Are They Citizens?”¹⁷⁰ The truth was, no one knew. The Court had ruled simply that Puerto Ricans were not aliens under existing immigration statutes, without reaching the question of citizenship. The Justices had reasoned that they were “not required to discuss the power of Congress”

167. *American Artist—Citizen of Porto Rico—Duties*, 24 Op. Att’y Gen. 40, 41 (1902).

168. *Gonzales*, 192 U.S. at 14–15 (quoting the Attorney General “in his communication to the Secretary of the Treasury”); Amicus Brief, *supra* note 129, at 32–33 (quoting 24 Op. Att’y Gen. 40 (1902)).

169. *Pernicious Power of Protection*, DALLAS MORNING NEWS, Jan. 11, 1904, at 6.

170. 10 VA. L. REG. 360 (1904).

to withhold citizenship from the inhabitants of the newly annexed territories, “or the contention of Gonzales’ counsel” (which as we have seen had also been put forward by Degetau) “that the cession of Porto Rico accomplished the naturalization of its people; or that of Commissioner Degetau, in his excellent argument as *amicus curiae*, that a citizen of Porto Rico, under the act of 1900, is necessarily a citizen of the United States. The question is the narrow one whether Gonzales was an alien within the meaning of that term as used in” immigration law.¹⁷¹ And the answer was an equally narrow “no.” The Court did not take up Coudert’s invitation to adopt the label “national,” nor did it adopt an alternative designation, nor did it endeavor to describe the status of the people of Puerto Rico and the Philippines in any detail. As an editor at *The Washington Magazine* wrote Degetau after congratulating him on the partial victory, “I notice...that the Supreme Court *dodged* the main question and only decided that Porto Ricans are *not foreigners*, but did not decide that they are *citizens* of the United States.”¹⁷²

Observers were baffled. The Foraker Act had been ambiguous enough, and now *Gonzales*, which had seemed destined to clarify things, had merely underscored the uncertainty.¹⁷³ “What is a Porto Rican?” asked the San José *Evening News* after the decision came down:

A Porto Rican is, to start with, a human being. There can be no getting around that fact. But when we try to characterize him further we get into the mazes of mystery.

The United States Supreme Court has just helped us along a little way, however, by deciding, not what the Porto Rican is, but what he isn’t. He isn’t an alien. That does not imply, however, as one might think, that he is a citizen. The court expressly guards itself against any such inference. It leaves the more weighty question as to what a Porto Rican actually is for further determination....¹⁷⁴

Although the Court had refused to be specific about what Puerto Ricans were, resolving only what they were *not*, it had gone at least so far as to

171. *Gonzales*, 192 U.S. at 12.

172. Letter from George [T.?] Moore to Degetau (Jan. 7 1904), in Degetau Papers, *supra* note *, 4/VIII/7 (emphasis in original).

173. See, e.g., Letter from P. G. Rosaly to Degetau (Mar. 30, 1903), in *id.*, 4/I/110 (original in Spanish) (“It made me very happy to learn that the issue of our Citizenship will be aired soon. I know and have no doubt that you will have occasion to secure a new triumph.”). But see Letter from [Manuel] Rossy to Degetau (May 12, 1903), in *id.*, 4/II/176 (original in Spanish) (predicting that, contrary to Degetau’s opinion, citizenship, if conferred, would be conferred by statute).

174. *What Is a Porto Rican?*, EVENING NEWS (San José, CA), Jan. 15, 1904, at 4.

assert that a "citizen of Porto Rico" was an "American."¹⁷⁵ The upshot was that "American" and "alien" were mutually inconsistent, but that a person could be "an American...and yet not be a citizen of the United States."¹⁷⁶

Degetau had been unable to conceive "how...an American [could] be at the same time not a citizen of the United States," and he was not alone in his resistance to this idea. "Logic and law often part company," commented one of the editorials on the *Gonzales* case:

The logicians tell us that, owing to the lack of sharp definition in our concepts, there is often between ideas that are contrary, but not absolutely contradictory, a *tertium quid*. The Supreme Court seems to hold that the terms "aliens" and "citizens" are contraries, and that the Porto Ricans belong to that vague and indefinable class—the *tertium quid*.¹⁷⁷

Another editorial, trying to make sense of the situation, complained of the scant guidance provided by the Court:

Little by little the Porto Rican begins to find out where he stands and what he is. Not long ago his country was declared not to be a "foreign country"; his ships are "American"; as artist, he is "American"; as sailor, he appears to be "American"; and now it has been decided that he is not an "alien." ... In view of the [Court's] guarded statements, the almost total absence of discussion, and the fact that the question was *narrowed* to the interpretation of the word alien within the meaning of a particular act, it is difficult even to surmise the effect of this decision.¹⁷⁸

175. *Gonzales*, 192 U.S. at 14.

176. *Id.* at 14–15. In light of the Court's resistance to the idea of an "American alien," it is worth noting that citizenship scholars have recently coined the phrase "alien citizens" to capture the dynamic relationship between inclusion and exclusion in American political membership. Linda Bosniak uses it to describe the ways in which citizenship is universal and restricted at the same time. See LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* 2–4 (2006). Ngai uses it to refer to U.S. citizens by birth who nevertheless are presumed to be foreigners "by the mainstream American culture and, at times, by the state." NGAI, *supra* note 3, at 2.

177. *Porto Ricans Are Not Aliens—Quaere: Are They Citizens?*, 10 VA. L. REG. 360, 360–61 (1904). The decision was enough of a departure from settled law as to mislead several observers, who announced that the Court had held that Puerto Ricans were citizens. See *Porto Ricans Are Citizens Says Court*, FORT WORTH STAR-TELEGRAM, Jan. 4, 1904, at 3; *Puerto Ricans Are Fellow Citizens*, MACON WKLY TELEGRAPH, Jan. 5, 1904, at 5.

178. *The Porto Rican Is Not an Alien*, 2 MICH. L. REV. 479, 479–80 (1904) (citations omitted).

Adding the status of Filipinos to the list of questions that the decision had left unanswered, *The New York Times* in October 1904 published the following news item:

Alexander Troup of [New Haven], in [sic] behalf of J.E. Laggdameo, a Filipino student at Yale, who yesterday was refused the right to register as a voter, to-day sent a number of interrogatories to Assistant Attorney General Robb at Washington. Mr. Robb had said that the Supreme Court has held that a Filipino is not a citizen of the United States. Mr. Troup's questions are:

What is the decision to which you refer? Does not the decision in *Gonzales vs. Williams*, decided Jan. 4, 1904, apply to Filipinos as well as to Porto Ricans? Are Filipinos aliens? Can any but aliens be naturalized? The Supreme Court, in *Gonzales vs. Williams*, leaves the question as to whether the cession of Porto Rico accomplished the naturalization of its people, and whether under the act of 1900, a citizen of Porto Rico is necessarily a citizen of the United States, open. Is it not equally open as to Filipinos? Has there been any later decision? If a Filipino is not an alien, under what statute can he be naturalized, and to what country will he forswear allegiance?¹⁷⁹

179. *Status of Filipinos*, N.Y. TIMES, Oct. 30, 1904, at 5. The Immigration and Naturalization Act of 1906 would resolve some of these questions, by providing for the naturalization of non-citizens owing "permanent allegiance" to the United States. See An Act To Establish a Bureau of Immigration and Naturalization, and To Provide for a Uniform Rule for the Naturalization of Aliens Throughout the United States (Immigration and Naturalization Act of 1906), § 30, 34 Stat. 596 (1906) ("That all the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States.") The provision included certain "modifications" including that the "applicant shall not be required to renounce allegiance to any foreign sovereignty." *Id.*; see also *Pass Naturalization Bill*, N.Y. TIMES, June 28, 1906, at 8 (reporting the Senate's passage of the bill and noting that it authorized Puerto Ricans "to come to the United States and be naturalized"). As an earlier news item on the Senate's passage of the bill had commented: "The fact was developed that citizens of Porto Rico, the Philippines, and other countries similarly situated with reference to the United States have no means of becoming naturalized as citizens of the United States and are therefore in that respect worse off than the people of other countries." *Naturalizing Porto Ricans*, PHILA. INQUIRER, Jan. 28, 1904, at 4. Congress referred to "organized territory" in the above-quoted Section 30; this included Puerto Rico and the Philippines, which though "unincorporated" were "organized" (because Congress had passed organic acts establishing civil governments there). On the various categories of territory (unorganized, organized, unincorporated, incorporated), see Jon M. Van Dyke, *The Evolving Legal Relationships Between the United States and Its Affiliated U.S. Flag Islands*, 14 U. HAW. L. REV. 445, 449-450 (1992). See generally ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED*

Even González's relatives weighed in. Although the decision established that González would be allowed to enter the United States freely (as would all territorial inhabitants, as long as Congress did not amend the immigration laws), González's uncle remained dissatisfied with the outcome: in a letter to the editor, he complained that the

Supreme Court of the United States...from the lofty heights of its judicial wisdom decided that my relative could land, but that the Porto Ricans were neither Americans nor foreigners; or rather, [it] did not decide this, [but] it decided that it had not decided anything. It left the nationality of Puerto Ricans in suspense, and it continues to be in suspense.¹⁸⁰

Collazo referred to "nationality" as if it were synonymous with citizenship; as this conflation suggests, the events of 1898-1904 had marked a sea change in the law of U.S. citizenship, and it took some getting used to: under the concept of U.S. citizenship embodied in the Citizenship Clause of the Fourteenth Amendment as it had been understood until then, Collazo would have been right to assume that citizenship and nationality were synonymous. But the Treaty of Paris, the Foraker Act, and the *Gonzales* decision together had pried citizenship and nationality apart. The nationality of Puerto Ricans was U.S. nationality; it was their citizenship that remained in suspense.

While the result in the *Gonzales* case was a disappointment, it was not exactly a surprise, at least to those who had followed the fate of the new territories in the Supreme Court: it was, after all, the logical extension of the *Insular Cases* of 1901 into the domain of citizenship. As noted above, in these cases the Court had already held that the newly annexed territories were neither foreign nor part of the United States, but rather "foreign...in a domestic sense."¹⁸¹ Now the Court had done essentially the same thing with respect to the people of these territories:

STATES TERRITORIAL RELATIONS (1989). Courts would subsequently narrow the scope of the Immigration and Naturalization Act of 1906 with respect to Filipinos, holding that most Filipinos (and by implication some unknown proportion of Puerto Ricans) remained nevertheless ineligible for citizenship because the relevant statutes limited naturalization to "free white persons." See *Hidemitsu v. United States*, 268 U.S. 402, 410 (1925).

180. Collazo, *supra* note 1. About Isabel González's personal fate, a law review editorial on the case had this to say: "While the case was pending, Miss Gonzales discovered the faithless lover, and persuaded him to keep his promise, and marry her; so all's well that ends well." *Porto Ricans Are Not Aliens*, 38 AM. L. REV. 121, 122 (1904); see also Erman, *supra* note 2, at 11. Beyond that, the historical record is silent on what became of González.

181. *Downes v. Bidwell*, 182 U.S. 244, 341-42 (1901) (White, J., concurring).

they were neither aliens nor, apparently, citizens, but something in between—the *tertium quid*.

Those Puerto Ricans who were sympathetic to the United States had started getting used to being disappointed. While the *Gonzales* decision had been pending, a friend had written Degetau to express his pessimism about its outcome: “I suppose you are aware that on the 30th of this month the Supreme Court will tell us *once again* that we are not Americans.”¹⁸² He meant, of course, American citizens: it had not occurred to him that they might be Americans yet not U.S. citizens, since he too was still operating under the assumption that the two were one and the same. The writer of this letter injected a bit of humor into his gloomy assessment: in its original language, the sentence was written in Spanish except for the words “once again,” which were in English—as if to show that English came as easily to him as Spanish, and in this way to make fun of the notion that Puerto Ricans were not competent to be considered full members of the American polity.¹⁸³ Another friend wrote Degetau that “we are all anxious to see what decision the Supreme Court will reach in the Isabel González case, to see whether it will manage to come up with something ridiculous.”¹⁸⁴ And something ridiculous, in the eyes of many, was just what it came up with, leaving Puerto Ricans in the same ambiguous situation that Congress had crafted especially for them with the label “citizens of Porto Rico.” In the words of one of Degetau’s constituents, “as you well know, the number of Puerto Ricans who are satisfied with the ridiculous title of citizen of P. Rico is very scarce, and all or almost all of us have different aspirations.”¹⁸⁵

Those aspirations, unmet by the American Commissioners, Congress, and the Court, were necessarily before Congress again: the Court had declined to be the one to resolve the citizenship status of Puerto Ricans

182. Letter from D. Collazo to Degetau (Nov. 21, 1903), in Degetau Papers, *supra* note *, 6/I/42 (original in Spanish). I do not know whether this D. Collazo is Isabel González’s uncle Domingo Collazo. Degetau’s correspondent gives his address as 317 W. 120th Street. The Domingo Collazo who appeared at González’s hearing on Ellis Island three months earlier gave his address as 163 St. Nicholas Avenue. Needless to say, this could be the same person. But this Collazo refers to the case in passing, without any indication of his own involvement in it (or of any awareness of Degetau’s involvement in it), which suggests that this was a different Collazo.

183. In its original language, the sentence read, “Supongo que no ignorará Ud. que el 30 del corriente nos dirá *once again* la Corte Suprema que no somos americanos.”

184. Letter from R.B. López to Degetau (May 18, 1903), in Degetau Papers, *supra* note *, 4/III/184 at 2 (original in Spanish).

185. Letter from Juan B. Pons to Degetau (Feb. 9, 1904), in *id.*, 4/VIII/28, at 3 (original in Spanish).

once and for all, and it was after all Congress' role under the Territory Clause of the Constitution to govern the island.¹⁸⁶ Would Congress end the suspense and declare native Puerto Ricans U.S. citizens? "If [Congress] does not grant us citizenship now," another friend wrote Degetau after learning of the *Gonzales* decision, "it will be because it wants to prove that I have been right in the conversations you and I have had concerning the voluntary deafness of Americans, by you denied and by me sincerely asserted."¹⁸⁷ This friend's prediction proved correct: displaying that "voluntary deafness of Americans," Congress took more than a decade to resolve the issue, not granting U.S. citizenship to Puerto Ricans until 1917—and then over the opposition of Puerto Rico's Resident Commissioner at the time, Luis Muñoz Rivera.¹⁸⁸ Even after that development, the Court continued to maintain that Puerto Rico remained "unincorporated" and "foreign" to the United States "in a domestic sense."¹⁸⁹

Like other correspondents of Degetau's, his old friend Manuel Rossy was disappointed but not exactly shocked by the result in *Gonzales*. Rossy, another highly educated Puerto Rican lawyer and politician who shared Degetau's extensive experience with the realities of being subjected to a colonial status, viewed the outcome of the case unsentimentally, through the lens of international law. If the Supreme Court could declare the inhabitants of annexed territory citizens of the United States merely by virtue of their annexation, he wrote Degetau, the United States "would not be a real nation, because it would carry within it the germs of the destruction of its own sovereignty and it would have to concede citizenship to any upstart or enemy who by chance it had to annex or conquer."¹⁹⁰

Rossy's statement echoed the reasoning of the 1901 *Insular Cases* as well, which themselves had relied on similar ideas concerning sovereignty and nationhood when they had concluded that a requirement of constitutional equality for newly annexed territory would somehow weaken the United States as a nation.¹⁹¹ Whether Rossy agreed with this

186. U.S. CONST. art. IV, § 3, cl. 2.

187. Letter from Herminio Díaz to Degetau (Jan. 5, 1904), in Degetau Papers, *supra* note *, 4/VII/3 (original in Spanish).

188. See An Act To Provide a Civil Government for Porto Rico, and for Other Purposes (Jones Act), 39 Stat. 951 (1917) [hereinafter Jones Act]. On this legislative development and on Muñoz's role in it, see generally CABRANES, *supra* note 1.

189. See *Balzac v. Porto Rico*, 258 U.S. 298 (1922).

190. Letter from Rossy to Degetau (Jan. 26, 1904), in Degetau Papers, *supra* note *, 4/VIII/14 (original in Spanish).

191. See, e.g., *De Lima v. Bidwell*, 182 U.S. 1, 218–19 (1901).

reasoning or was simply resigned to accept it as the governing legal doctrine of the time, his assessment of the United States' asserted prerogative and Puerto Rico's inescapable predicament was precisely on point: in what had emerged as the prevailing view in the United States in this period, a "real nation" was tantamount to an imperial nation—it must be capable of *both* territorial expansion *and* colonial governance. This conclusion was implicit in the suggestion that full sovereignty must include the capacity to deny citizenship to the inhabitants of annexed territory, and that anything less would make for something less than a real nation.

In this sense, imperialism was crucial to the process of U.S. nation-building. The subjection of colonial populations under U.S. sovereignty to a second-class status did not simply pave the way for the exercise of extensive discretion by U.S. officials in the administration and governance of their new colonies. More than that, the creation of a new form of partial membership for the new colonial subjects—one that could be expanded indefinitely, as the United States expanded indefinitely—established the United States as an empire, and earned it recognition as an equal to European empires in international terms. This was a crucial contribution to the consolidation of the United States as a modern nation-state, for it constituted hard evidence that the United States possessed the full sovereignty of a "real nation"—evidence for all the world to see.

CONCLUSION

By avoiding the constitutional question of whether Congress actually had the power to withhold citizenship from Puerto Ricans, the Court in effect gave Congress that power: although the *Gonzales* opinion carefully sidestepped the issue, the decision ratified the denial of citizenship by leaving it in place. Meanwhile Congress continued to debate the citizenship status of the inhabitants of the annexed territories fitfully until, in 1916 and 1917, respectively, it resolved that Filipinos would remain non-citizen nationals (and the Philippines would eventually become independent), while Puerto Ricans would become citizens (and Puerto Rico would remain subject to U.S. sovereignty).¹⁹² In 1935, as part of

192. See An Act To Declare the Purpose of the People of the United States as to the Future Political Status of the People of the Philippine Islands, and To Provide a More Autonomous Government for Those Islands, 39 Stat. 545 (1916) (Philippines); Jones Act § 5, *supra* note 188, at 953 (Puerto Rico).

the transition to Philippine independence, Congress finally resolved one of the questions that the Supreme Court had left unanswered in the *Gonzales* case—whether noncitizen nationals could be barred from entry into the United States—by imposing strict quotas on Filipinos and subjecting some of those already present in the United States to deportation.¹⁹³

As for the grant of U.S. citizenship to Puerto Ricans, as noted above, even then their legal situation remained deeply ambiguous. Citizenship came to persons born in Puerto Rico by way of a statute passed by Congress in the exercise of its power under the Territory Clause, leaving unresolved the question of whether their citizenship also derived from (and therefore was protected by) the Citizenship Clause of the Fourteenth Amendment—a question that remains unanswered today.¹⁹⁴ And in *Balzac v. Porto Rico* (1922), the Court held that not even the grant of citizenship had incorporated Puerto Rico into the United States, thus leaving untouched the island's status as an "unincorporated" territory.¹⁹⁵ This, too, remains the case today: even as Puerto Rico has become increasingly integrated into the United States, it still has not been "incorporated" into the United States in a constitutional sense.¹⁹⁶ Thus Puerto Ricans remain a population of U.S. citizens subject to U.S. sovereignty without a clear or permanent relationship to the rest of the United States—a situation that has given rise to a seemingly interminable debate over the island's political status.¹⁹⁷

193. See To Provide for the Complete Independence of the Philippine Islands, To Provide for the Adoption of a Constitution and a Form of Government for the Philippine Islands, and for Other Purposes (Philippine Independence Act), § 8(a)(1)–(2), 48 Stat. 456 (1934); see also NGAI, *supra* note 3, at 119–20; Donald S. Leeper, *Effect of Philippine Independence on Filipino Citizens Resident in the United States*, 50 MICH. L. REV. 159 (1951); Donald S. Leeper, *Effect of Philippine Independence on Filipinos Residing in the United States*, 50 COLUM. L. REV. 371 (1950).

194. Jones Act § 5, *supra* note 188, at 953; see also Raúl Serrano Geyls, *The Territorial Status of Puerto Rico and Its Effect on the Political Future of the Island*, 39 REV. JUR. U. INTER. P.R. 13, 63 (2004) (stating that persons born in Puerto Rico have statutory, not constitutional, citizenship); Lisa Napoli, *The Legal Recognition of the National Identity of a Colonized People: The Case of Puerto Rico*, 18 B.C. THIRD WORLD L.J. 159, 178–79 (1998) (opining that it is unclear whether the U.S. citizenship of Puerto Ricans is statutory or constitutional). For a thorough examination of this issue, see Lisa M. Pérez, Note, *Citizenship Denied: The Insular Cases and the Fourteenth Amendment*, 94 VA. L. REV. (forthcoming June 2008).

195. *Balzac v. Porto Rico*, 258 U.S. 298, 305–06 (1922).

196. See, e.g., PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS, REPORT BY THE PRESIDENT'S TASK FORCE ON PUERTO RICO'S STATUS 7 (2006). See generally U.S. GEN. ACCOUNTING OFFICE, U.S. INSULAR AREAS: APPLICATION OF THE U.S. CONSTITUTION (1997).

197. On this debate, see RAYMOND CARR, PUERTO RICO: A COLONIAL EXPERIMENT pt. 2 (1984); JOSÉ TRÍAS MONGE, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD chs. 11–14 (1997); NANCY MORRIS, PUERTO RICO: CULTURE, IDENTITY, AND POLITICS pt. 1

And what of the noncitizen national?¹⁹⁸ Few of them remain under U.S. law, but the distinction between citizenship and nationality, and the potential for its expansion, persists.¹⁹⁹ Lawyers describe the distinction in matter-of-fact terms: citizenship, they say, designates membership under constitutional (or domestic) law; nationality designates membership under international law.²⁰⁰ Yet hardly anyone has bothered to ask why we have different terms to designate membership in the international and domestic contexts to begin with.²⁰¹ The aim of this Article has been to subject that distinction to historical scrutiny; to tell the story of a figure whose lived experience brings to light the stakes of that dis-

(1995); Ramón Grosfoguel, Frances Negrón-Muntaner, & Chloé S. Georas, *Beyond Nationalist and Colonialist Discourses: The Jaiba Politics of the Puerto Rican Ethno-Nation*, in PUERTO RICAN JAM: ESSAYS ON CULTURE AND POLITICS (Ramón Grosfoguel & Frances Negrón-Muntaner eds., 1997); Christina Duffy Burnett, *The Case for Puerto Rican Decolonization*, 45 ORBIS 433 (2001).

198. The term “national,” referring to noncitizens owing allegiance to the United States, soon made its way into U.S. law. By 1906, the State Department had begun using the term. See 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 273 (1906). Meanwhile, lawyers and legal scholars increasingly embraced it. See, e.g., McGovney, *supra* note 48, at 232 (“In France several years ago, the word *national* came into use for this purpose, and is now general there. The more learned and clearer American and English writers have adopted it; and in spite of the objection of purists, clearness of thought and exposition demand its use.”). The Nationality Act of 1940 defined the phrase “national of the United States” to include citizens and noncitizens owing permanent allegiance to the United States. See An Act To Revise and Codify the Nationality Laws of the United States into a Comprehensive Nationality Code (Nationality Act of 1940), § 101(b)(1)–(2), 54 Stat. 1137 (1940). For a broad discussion of non-citizen nationals in U.S. law, see Dudley O. McGovney, *Our Noncitizen Nationals: Who Are They?*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 323 (Max Radin & A.M. Kidd eds., 1935). Curiously, the Court itself was slow to adopt the term, after having laid the groundwork for its adoption. Its earliest use of the phrase “noncitizen national” seems to have been relatively recent (and rather tentative). See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 90 (1976) (“Apparently the only persons other than citizens who owe permanent allegiance to the United States are noncitizen ‘nationals.’”).

199. The category now covers persons born in American Samoa and Swain’s Island. See Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(3), (a)(21), (a)(22), (a)(29).

200. See, e.g., Kim Rubinstein & Daniel Adler, *International Citizenship: The Future of Nationality in a Globalized World*, 7 IND. J. GLOBAL LEGAL STUD. 519, 521 (2000) (“While essentially the same concept, these words reflect two different legal frameworks. Both terms identify the legal status of an individual in light of his or her State membership. But the term ‘citizenship’ is confined mostly to domestic legal forums, while the term ‘nationality’ is connected to the international law forum.”).

201. But see Tshepo L. Mosikatsana, *Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341, 374 n.194 (1998) (“In practice, the terms [citizenship and nationality] usually are used interchangeably because those persons with the citizenship of a particular state usually hold that state’s nationality. A distinction between the terms sometimes was made in a colonial context whenever a colonial power was not prepared to afford all its subjects equal status.”). I explore this topic, and the international legal history of nationality more generally, in Christina Duffy Burnett, *Citizenship in the Time of Empire* (unpublished manuscript on file with author).

tion; and to suggest that it is no coincidence that the distinction made its way into U.S. law in the context of empire. In the process, I hope to have demonstrated that the events surrounding the *Gonzales* case more than repay scholarly attention. Beyond contributing to the familiar debate over whether “the” Constitution “follows the flag” outside the boundaries of a narrowly defined United States, careful attention to these events reveals a world of American legal cosmopolitanism: a world inhabited by legal intellectuals both in the United States and in its colonial periphery, all of whom grappled with the encounter among multiple legal traditions and between constitutional and international law, and did so in the shadow of empire.

Federico Degetau y González would live out his days as a noncitizen national: he died in 1914, three years before Puerto Ricans became U.S. citizens.²⁰² By telling the story of Degetau, who participated actively in the debate over U.S. imperialism and who engaged in particular with the issue of citizenship in annexed territory, I hope to have shown that scholarship on the legal history of American imperialism stands to benefit from a more transnational approach, from continued and deepening archival research, and, in particular, from attention to a group that might be described (with tongue in cheek) as “dead white Hispanic males.” This group—the intelligentsia of the colonial periphery; the colonial counterparts to the imperial agents of the United States—have so far fallen through the cracks of a historiographical shift from high political and diplomatic history (in which the educated and powerful elite of the imperial metropolises figured prominently) to social history, which turned its attention to the colonial periphery and, simultaneously, to the experiences of the marginalized and oppressed: slaves, workers, women. This salutary shift has uncovered stories that without a doubt deserved to be told. But in the process, important aspects of the study of the legal and intellectual history of U.S. imperialism in the colonial periphery have languished.

In Puerto Rico, the elite did, yes, mostly “collaborate” with the annexation. But to take this to mean that they simply rolled over and accepted their fate as colonial subjects is fundamentally to misconstrue the nature of their legal and political vision—and indeed to engage in a ver-

202. After Degetau’s second term as Resident Commissioner ended in 1905, he retired from active political life, dedicating himself to the practice of law and to other interests, including interests related to pedagogy; in 1905 he was appointed a Trustee of the University of Puerto Rico, a position in which he remained until his death, and in the last years of his life he worked assiduously, although ultimately unsuccessfully, toward the founding of a Pan-American University in Puerto Rico. See MERGAL LLERA, *supra* note 17, at 52, 128–130.

sion of the chauvinism they faced (which we find so problematic today). Bringing to bear a more sympathetic historical imagination allows us to see the ways in which the history of this period is the history of paths not taken in American federalism; it allows us to recognize that the American legal cosmopolitans of turn-of-the-twentieth century Puerto Rico imagined possibilities within American federalism that would be well worth trying to understand, and perhaps recover, today.²⁰³ Their capacious vision of federalism within American nationhood could encompass peoples with different histories, cultures, and traditions; but this vision clashed with the narrower view of the relationship between national identity and territorial sovereignty that ended up prevailing. Put differently, their ready acceptance of the U.S. presence in Puerto Rico had a great deal more to do with their embrace of a cosmopolitan form of patriotism, difficult to fathom today, in which support for inclusion within the U.S. polity co-existed comfortably with a proto-nationalist commitment to Puerto Rico. “With a white glove and cold Anglo-Saxon blood I reason with them and defend my country,” wrote Degetau (as we saw above) to his friend Barbosa—who, as it happened, was black (or at any rate would have been considered black by U.S. standards). With these words Degetau described his efforts to retain his composure while defending Puerto Rico against various outrageous prejudices held by even the well-intentioned Americans he met, which drove them to resist the idea that Puerto Rico might be included within the United States. With these words Degetau also implied that he saw no inconsistency between being Puerto Rican and deploying a so-called Anglo-Saxon sensibility—alien, perhaps, but useful—powerful—without doubt. It is refreshing, to say the least, in light of the massive evidence that historians have brought to light of the low opinion held by much of the U.S. public at the turn of the twentieth century regarding the inhabitants of their newly annexed territories, to witness a voice from the colonial periphery dismissing such attitudes, with more than a touch of ironizing disdain.

In short, attention to these heretofore neglected figures brings a fresh perspective to the study of U.S. imperialism. Where U.S.-centered scholars have seen yet another example of the imposition of ideas of

203. The same can be said of other episodes in the history of U.S. imperialism, in places such as Cuba, Panama, the Philippines, or even the American west. As I argue in this and other work, when approached with a view toward recovering “paths not taken” in American federalism, the history of U.S. imperialism yields food for thought not only about the significance of expansion and empire in U.S. in history, but also about the development and current understandings of American federalism. See, e.g., Burnett, *supra* notes 16, 201.

Anglo-Saxon superiority on marginalized peoples subject to U.S. sovereignty, Degetau saw something somewhat different (if equally pernicious): the importation into U.S. law of an insidious geographically based form of discrimination, favoring peninsular Spaniards over creoles, with its own racist content (for it reflected in part longstanding suspicions about the creoles' *pureza de sangre* or racial purity), which with its reincarnation under the new sovereignty poisoned Puerto Rico-U.S. relations from the start. Where constitutional scholars have identified the denial of individual constitutional rights as the salient harm wrought upon U.S. colonies by the legal doctrines of U.S. empire, the Puerto Ricans who sought Degetau's assistance were more concerned with a range of other forms of subjection—not to mention the humiliation of being detained, harassed, questioned, and rejected, and the unbearable uncertainty of having a political identity defined as “in suspense.”

And where historians have seen powerful imperial agents imposing their worldviews on a smaller, weaker, and essentially defenseless colonial population, the archival materials reveal something somewhat unexpected: a tone or quality in the conversation among the educated elite of the colonial periphery that is well worth recovering. As the letters from Degetau's archive quoted above reveal, the American legal cosmopolitans of the colonial periphery wielded a sharp pen. They brought a wry, polyglot humor to what was obviously a situation of great moment, and in many ways, for many of them, of great sadness; and they peppered their correspondence with insightful, irreverent, and witty commentary on their new predicament and on their fellow Americans. All the while, they insisted (albeit with limited success) that the United States live up to the promise of equal citizenship—a citizenship conferring not just rights and obligations but also dignity and respect.